No. -

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDMUND S. MUSKIE, SECRETARY OF STATE,
PETITIONER

v.

PHILIP AGEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Secretary of State, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

QUESTION PRESENTED

Whether the President, acting through the Secretary of State, has authority to revoke the passport of an American citizen whose international travel activities have caused and will continue to cause serious damage to the national security and foreign policy of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–91a) is not yet reported. The opinion of the district court (App. B, *infra*, 92a–99a) is reported at 483 F. Supp. 729. The administrative decision revoking respondent's passport (App. G, *infra*, 119a–124a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 100a–101a) was entered on June 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

22 U.S.C. (& Supp. II) 211a provides:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

22 C.F.R. 51.70(b) provides:

> A passport may be refused in any case in which:
>
> * * * * *
>
> (4) The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States * * *

22 C.F.R. 51.71 provides:

> A passport may be revoked, restricted or limited where:
>
> (a) The national would not be entitled to issuance of a new passport under § 51.70 * * *

STATEMENT

1. Between 1957 and 1968, respondent, an American citizen, held a position of trust with the Central Intelligence Agency (App. A, *infra*, 2a, 18a; App. E, *infra*, 105a–106a; App. F, *infra*, 113a–114a).[1] Upon entering on duty with the CIA, respondent pledged not to discuss or publish, without prior approval, "any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment * * *" (App. A, *infra*,

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[1] Respondent waived his right to an administrative hearing in this case and, in light of respondent's express concession that his international travel activities have caused and probably will continue to cause serious damage to the nation's security and foreign policy (see page 6, *infra*), no evidentiary hearing was held in the district court. The statement of facts is thus derived from respondent's concessions in the district court and the essentially undisputed affidavits (but see note 2, *infra*) submitted by the government in the district court in support of its motion for summary judgment (App. D, *infra*) and its application for a stay pending appeal (Apps. E and F, *infra*).

18a; App. E, *infra*, 106a). See generally *Snepp* v. *United States*, No. 78-1871 (Feb. 19, 1980). During his tenure with the CIA, respondent received training in CIA clandestine operations, including the methodologies employed to provide cover for CIA employees and sources. He also served in undercover CIA assignments abroad and became personally acquainted with numerous other undercover CIA employees, many of whom are still active and whose association with the CIA has never been officially acknowledged (App. E, *infra*, 105a-106a; App. F, *infra*, 113a-114a).

In 1974, respondent publicly announced a campaign to disrupt and destroy the CIA. Since that time, respondent, who currently resides in the Federal Republic of Germany, has traveled abroad extensively, purporting to identify individuals within specific countries as CIA agents, employees, or sources. As respondent acknowledges (App. A, *infra*, 4a, 17a-20a, 29a; App. B, *infra*, 94a; App. E, *infra*, 107a-112a), his activities and allegations have endangered the safety of many employees of the United States, whether or not they are connected to the CIA, and have caused substantial damage to the foreign policy and national security of the United States. In particular, respondent's allegations about CIA operations are designed to force the expulsion of American employees from foreign countries and constitute a serious threat to the lives and safety of such employees (App. A, *infra*, 19a-20a, 24a; App. D, *infra*, 102a-103a; App. E, *infra*, 107a, 111a-112a; App. F, *infra*, 113a, 118a).

International travel has been and continues to be essential to respondent's avowed campaign against the

CIA. His ability to travel abroad greatly enhances his potential to disrupt and damage American foreign policy and national security interests. Respondent is thus able to collect information that he needs to expose alleged CIA operations and employees; to find, recruit, and train individuals willing to assist in carrying out his program in various foreign countries; to make personal contact with extremist groups; and to receive the type of intense local media coverage that he uses to incite hostile foreign groups to take action against American interests and personnel (App. E, *infra*, 107a–112a; App. F, *infra*, 113a–118a). See also note 6, *infra*.

Recent events have underscored the potential, if not actual, consequences of respondent's international travel activities. Citizens of various foreign countries, particularly Islamic nations, have demonstrated an increasing sensitivity to allegations that the United States has conducted or is conducting intelligence operations within their borders (App. D, *infra*, 102a). Indeed, suspicions of CIA activity within Iran may have contributed to the anti-American feelings that led to the forcible takeover of the United States Embassy in Tehran in November 1979 and the continued imprisonment of more than 50 hostages by Iranian militants (App. A, *infra*, 21a–23a; App. D, *infra*, 102a). Shortly after the embassy takeover, it was reported that respondent had been invited to travel to Iran to participate in a tribunal concerning the American hostages (*id.* at 103a; App. F, *infra*, 116a–117a). And respondent himself has suggested that the Iranian militants exchange the hostages for records of CIA intelligence operations in Iran, and he has offered to assist

the militants in analyzing any CIA documents that come into their possession (App. F, *infra*, 117a).[2]

Based on respondent's activities and in light of then-recent events in Iran, Pakistan, and Libya, the Secretary of State revoked respondent's passport on December 23, 1979 (App. A, *infra*, 2a, 23a; App. E, *infra*, 112a; App. G, *infra*, 119a–124a). The letter revoking the passport stated that the Secretary's action was authorized by 22 C.F.R. 51.70(b)(4) and 51.71, which provide that the Secretary of State may revoke a citizen's passport if his "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." The letter to respondent further explained (App. G, *infra*, 120a):

> Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark,

[2] With the one clarification described below, the affidavits filed by respondent in the district court and the court of appeals do not deny the facts stated in the affidavits submitted by the government in the courts below. Specifically, respondent does not deny that he is engaged in a campaign to expose clandestine CIA activities and undercover personnel and that his ability to travel internationally facilitates this campaign in the various ways detailed above. Following revocation of his passport, respondent did state that he has no present intent to go to Iran while American hostages are still being held in that country. But respondent gave no assurance as to his possible future actions or intentions. Nor has respondent denied that he suggested that the militants exchange the hostages for CIA documents about Iran and that he offered to assist the militants in analyzing such documents.

> Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

The State Department also informed respondent of his right to a hearing under 22 C.F.R. 51.80 through 51.105 and offered to hold an expedited hearing in West Germany (App. G, *infra*, 120a, 123a–124a).

2. Respondent waived his right to an administrative hearing and instead filed this suit in the United States District Court for the District of Columbia (App. A, *infra*, 4a; App. B, *infra*, 93a). Respondent attacked the revocation of his passport on both statutory and constitutional grounds[3] and sought declaratory and injunctive relief from the Secretary's action. Both sides moved for summary judgment. For purposes of the summary judgment motions, respondent admitted that the allegations contained in the letter of revocation are true. That is, respondent expressly conceded that his "activities * * * have caused serious damage to the national security and foreign policy of the United States" and that his "stated intention to continue such activities threatens additional damage of the same kind" (App. A, *infra*, 4a; App. B, *infra*, 94a; App. G, *infra*, 120a).

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[3] In particular, respondent claimed that the Secretary's regulations were not authorized by Congress, that the Secretary could not revoke his passport without a prior hearing, and that the revocation violated his First and Fifth Amendment rights (App. B, *infra*, 93a–94a).

On January 28, 1980, the district court declared 22 C.F.R. 51.70(b)(4) invalid and ordered the Secretary to restore respondent's passport (App. B, *infra*, 99a). The court observed that the right to travel internationally is constitutionally protected and that the Secretary may therefore revoke the passport of an American citizen only if "he acts pursuant to an explicit [congressional] delegation or * * * he has followed 'sufficiently substantial and consistent' administrative practice to warrant the implied approval of Congress" (App. B, *infra*, 95a, quoting *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965)). The court concluded that the Secretary failed to establish such a delegation or a settled administrative practice in the area of foreign affairs or national security, and it accordingly declared that the regulation had been promulgated without statutory authority (App. B, *infra*, 95a–99a).[4]

3. On appeal, a divided panel of the court of appeals affirmed (App. A, *infra*, 1a–91a). After reviewing this Court's decisions in *Kent* v. *Dulles*, 357 U.S. 116 (1958), and *Zemel* v. *Rusk*, *supra*, the court of appeals agreed with the district court that the Secretary's regulations are valid only if "Congress has authorized 22 C.F.R. § 51.70(b)(4) either by an express delegation or by a 'sufficiently substantial and consistent' administrative practice to warrant finding the implied approval of Congress" (App. A, *infra*, 11a). The court of appeals held that the Passport Act of 1926, 22 U.S.C. 211a, does not explicitly authorize the revocation of a passport on national security or foreign policy

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[4] In view of this disposition, the district court did not address respondent's constitutional claims (App. B, *infra*, 98a–99a).

grounds (App. A, *infra*, 11a–13a). The court also concluded that the Executive's past administrative practice of denying and revoking passports to protect this country's national security and foreign policy interests was too insubstantial to "demonstrat[e] implied congressional authorization for the challenged regulation" (*id.* at 14a).[5] The court further observed that the Executive has authority to revoke respondent's passport if he were charged with a crime, but that no such formal allegation had been made (*id.* at 16a). The court therefore held the Secretary's regulations invalid, noting that "[w]e are bound by the law as we find it" (*ibid.*).

Judge MacKinnon dissented (*App.* A, *infra*, 17a–91a), asserting that "[n]o United States Congress would ever intend to require a President to issue a passport to one with [respondent's] record and intentions" (*id.* at 17a). In a lengthy opinion, Judge MacKinnon traced the history of the Secretary's statutory authority and administrative practice regarding the denial and revocation of passports on national security and foreign policy grounds (*id.* at 30a–54a, 64a–68a). Judge MacKinnon concluded that, since at least 1856, the Secretary of State, in peacetime as well as war, had repeatedly denied and revoked passports on foreign policy and national security grounds and that Congress was fully aware of this consistent administrative practice (*id.* at 43a–52a). This historical record,

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[5]The court explained that the Executive's authority "to restrict or condition the issuance of passports during time of war or national emergency [was] inapposite and unpersuasive on the issue of implicit authority to invoke national security or foreign policy considerations during peacetime" (App. A, *infra*, 15a).

in Judge MacKinnon's view, clearly constituted a " 'sufficiently substantial and consistent administrative practice to warrant the implied approval of Congress.' *Zemel* v. *Rusk*, 381 U.S. at 12" (App. A, *infra*, 52a).

In addition, the dissenting opinion pointed out that in *Zemel* v. *Rusk*, *supra*, the Court upheld a blanket denial of passports to an entire geographical area on national security and foreign policy grounds and that

> [t]he greater power to deny passports to all citizens for a limited area on such grounds necessarily includes the lesser power to deny a passport to an individual citizen *on the same grounds* where it is *conceded* that his *worldwide activities* have caused serious damage to our national security and foreign policy, and that his stated intention to continue such activities was "likely to cause" additional damage of the same character.

App. A, *infra*, 34a–35a (emphasis in original). Finally, Judge MacKinnon distinguished *Kent* v. *Dulles*, *supra*, on which the majority had principally relied, on the ground that *Kent* concerned the Secretary's decision to deny passports merely because of the applicants' beliefs and ideology. Here, by contrast, respondent's *activities* abroad have caused and will continue to cause serious damage to the national security and foreign policy of the United States (App. A, *infra*, 56a–57a) and involve arguably illegal conduct (*id.* at 56a–63a, 72a–91a).

REASONS FOR GRANTING THE PETITION

This case presents the important question whether the Executive may revoke a citizen's passport to protect the national security and foreign policy of the

United States. Notwithstanding respondent's express concession that his international travel activities are causing and are likely to continue to cause serious damage to the national security and foreign policy of the United States, the court of appeals has concluded that the Passport Act of 1926, 22 U.S.C. 211a, does not authorize the President, acting through the Secretary of State, to revoke respondent's passport. That cramped construction of the sweeping language of the Passport Act disregards the President's broad powers and responsibilities in the area of national security and foreign affairs, ignores congressional intent as evidenced by several travel control statutes, and fails to accord proper deference to the Secretary's longstanding administrative practice of denying or revoking passports on national security and foreign policy grounds. We submit that it is inconceivable that Congress intended to deprive the Executive of the authority to revoke the passport of a person, such as respondent, whose international travels have caused and will continue to cause serious damage to the vital interests of the United States.

Contrary to the view of the court of appeals, this Court's decision in *Kent* v. *Dulles*, 357 U.S. 116 (1958), does not dictate that respondent be allowed to retain his passport. That decision did not address the right of an American citizen to compel issuance of a passport for the purpose of engaging in travel designed to cause substantial harm to the national security. Moreover, although the decision of the court below does not conflict with the decision of any other court of appeals, no conflict among the circuits is likely

ever to arise. Henceforth, any person seeking to challenge the revocation or denial of a passport pursuant to 22 C.F.R. 51.70(b)(4) will file suit in the District of Columbia. Finally, although the Executive has judiciously exercised its authority in this area in the past, the inability to deny and revoke passports on national security or foreign policy grounds will significantly impair discharge of its duties in the volatile international arena.[6] Accordingly, review by this Court is warranted.

1. The Passport Act of 1926, 22 U.S.C. 211a, provides that the "Secretary of State may grant and issue passports * * * under such rules as the President shall designate and prescribe for and on behalf of the United States * * *."[7] Pursuant to this authority, the Secretary of State has promulgated regulations authorizing the denial and revocation of passports on national security and foreign policy grounds. 22 C.F.R. 51.70(b)(4) states that a passport will not be issued to

[6] As noted above (see pages 3–6, *supra*), respondent's travel activities imperil government personnel abroad and interfere with this nation's relationships with foreign countries. Indeed, on July 2, 1980, subsequent to the court of appeals' decision in this case, Louis Wolf, co-author with respondent of *Dirty Work: The CIA in Europe* (1978), held a press conference in Kingston, Jamaica, and named 15 persons as CIA agents in that country. The names and home addresses of these individuals were thereafter published in the local media. Within one week of Wolf's publicized announcement, two of the homes of the named individuals were subjected to violent, armed attacks (App. H, *infra*, 125a–127a) (affidavit submitted to court of appeals in support of stay pending review on certiorari).

[7] By Exec. Order No. 11,295, 31 Fed. Reg. 10603 (1966), *reprinted in* 22 U.S.C. 211a note, the President has delegated to the Secretary of State the authority to designate and prescribe rules governing passports.

an applicant if "[t]he Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."[8] 22 C.F.R. 51.71, in turn, authorizes the Secretary to revoke a passport in any circumstance in which the national would not be entitled to issuance of a new passport.[9]

Nothing in the unrestricted language of the Passport Act suggests that the Secretary is prohibited from revoking or denying a passport on national security or foreign policy grounds. As the official charged with enforcing that statute, the Secretary's determination that Congress intended to grant such authority is entitled to substantial deference. *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965). Indeed, judicial deference is particularly appropriate here because the statute implicates "the conduct of foreign relations * * * [which is] so exclusively entrusted to the political branches of government as to be largely immune from judicial in-

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[8]The current version of 22 C.F.R. 51.70(b)(4) was promulgated in 1968. 33 Fed. Reg. 5681 (1968). Since 1861, the Executive has from time to time issued similar directives and has invoked this authority to deny passports. See, *e.g.*, 3 J. Moore, *International Law Digest* 902, 919–923 (1906); 3 G. Hackworth, *Digest of International Law* 498–499 (1942); Pres. Proc. of Aug. 8, 1918, Section 1, 40 Stat. 1831; 6 Fed. Reg. 6069, 6349 (1941); 7 Fed. Reg. 2590–2591, 3708 (1942); 17 Fed. Reg. 8013 (1952); 21 Fed. Reg. 336 (1956); *The Right to Travel: Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess., Pt. 2, 59–60, 66–68, 75, 101, 164–165, 180–181, 248–249, 266, 343–350 (1957). See also App. A, *infra*, 43a–52a.

[9]Under 22 C.F.R. 51.70, the Secretary may also deny passports to fugitives, parole violators, incompetent persons, and individuals who have failed to pay repatriation loans. See also *Kent* v. *Dulles*, *supra*, 357 U.S. at 127.

quiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952).

The passport itself is an instrument of foreign policy (*United States* v. *Laub*, 385 U.S. 475 (1967)),[10] and the Executive has broad powers and responsibilities under Article II of the Constitution in the fields of foreign affairs and national security. See, *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Snepp* v. *United States*, *supra*, slip op. 3 n.3, 5 n.7.[11] Where, as here, the Executive acts pursuant to both a legislative grant of broad authority over foreign affairs and its own inherent authority in this area, the courts "should hesitate long before limiting or embarrassing such powers." *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915). See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964);

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[10] This Court observed in *Laub* (385 U.S. at 481) that an American passport "in effect request[s] foreign powers to allow the bearer to enter and to pass freely and safely [and] recogniz[es] the right of the bearer to the protection and good offices of American diplomatic and consular officers." The holding of the court below thus requires the United States to extend its aid and to invoke the aid of other countries in facilitating the international travels of a person whose activities abroad are essential to his campaign to discredit the CIA, an agency "thought * * * to be essential to the security of the United States and—in a sense—the free world." *Snepp* v. *United States*, No. 78-1871 (Feb. 19, 1980), slip op. 5 n.7.

[11] In particular, we note that the Executive has statutory authority, as well as an inherent responsibility, "to obtain or effectuate the release" of "any citizen of the United States * * * unjustly deprived of his liberty by or under the authority of any foreign government" (22 U.S.C. 1732) and to "protec[t] intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)).

Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103, 109–112 (1948).[12]

2. The history of passport control legislation strongly supports the conclusion that the Passport Act of 1926 authorizes the Executive to revoke the passport of a citizen whose international travel activities are causing serious damage to the national security and foreign policy of the United States. In 1918, Congress declared that in time of war it was "unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport." Act of May 22, 1918, ch. 81, Section 2, 40 Stat. 559. The legislative history accompanying this passport control measure clearly reflects Congress' understanding that the President could deny passports to "renegade Americans" who might transfer "important military information" to the enemy or to citizens who had already assisted the enemy but "[t]he known facts in [whose] case [were] not sufficient to warrant the institution of a criminal prosecution * * *." H.R. Rep. No. 485, 65th Cong., 2d Sess. 2–3 (1918). Indeed, the fundamental purpose of the 1918 Act, which did not itself grant authority or specify standards for passport denial, was to allow the Executive to refuse passports to persons whose travel abroad would prejudice the national security. Without this power over the denial

[12] In the volatile and sensitive areas of foreign affairs and national security, Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel* v. *Rusk*, *supra*, 381 U.S. at 17. See *Goldwater* v. *Carter*, No. 79–856 (Dec. 13, 1979), slip op. 4 n.1 (Powell, J., concurring); *United States* v. *Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 315–322.

and revocation of passports, the Executive would have been wholly unable to effectuate the design of the 1918 legislation to protect "the public safety." 40 Stat. 559.

In the absence of clear evidence to the contrary, it is unreasonable to assume that eight years later, in codifying the Executive's broad authority over passports, Congress intended to *withdraw* from the Executive the ability to protect the nation's security and foreign policy through exercise of the passport power. See, *e.g.*, *Owen* v. *City of Independence, Missouri*, No. 78-1779 (Apr. 16, 1980), slip op. 14; *Gooding* v. *United States*, 416 U.S. 430, 457-458 (1974); *Panama R.R.* v. *Johnson*, 264 U.S. 375, 384 (1924). As the Court remarked in *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 545-546 (1978), quoting *Duparquet Co.* v. *Evans*, 297 U.S. 216, 221 (1936), "a statute come[s] 'freighted with the meaning imparted to [it] by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a teacher that is not to be ignored.' "

Moreover, passport control measures enacted since 1926 demonstrate the same congressional understanding. In 1941, for example, Congress concluded that the outbreak of World War II required "legislation providing for the centralization of control over the entry into and departure from the United States of persons of all classes." S. Rep. No. 444, 77th Cong., 1st Sess. 2 (1941). In order to achieve centralized control over travel by American nationals, Congress simply prohibited such travel without a passport, thereby relying on the Executive to implement the legislation. See Act

of June 21, 1941, ch. 210, 55 Stat. 252. Because the explicit purpose of the 1941 statute was to control international travel in order to promote "the national defense" (S. Rep. No. 444, *supra*, at 2), Congress obviously assumed that the Executive's discretionary authority under the Passport Act includes the power to deny or revoke passports for reasons of national defense.

The same conclusion follows from the most recent legislation regulating international travel by American citizens. Although previous travel control statutes had been applicable only in times of war or equivalent national emergencies,[13] in 1978 Congress decided to require passports for international travel at all times. Pub. L. No. 95-426, Section 707(b), 92 Stat. 993. The legislative history of this provision clearly indicates that Congress intended the Executive "to control the departure of U.S. citizens to foreign countries when such travel is inconsistent with a greater government interest" (S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978)), thus demonstrating once more Congress' assumption that a citizen could be denied a passport on national security or foreign policy grounds. See App. A, *infra*, 43a-44a.[14]

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[13] See also Immigration and Nationality Act, ch. 477, Section 215(a), 66 Stat. 190 (1952 amendment to the travel control provision).

[14] The legislative history accompanying the 1978 enactment is particularly relevant, because Congress also reconsidered and amended the Passport Act itself at that time. See Pub. L. No. 95-426, Section 124, 92 Stat. 971, codified at 22 U.S.C. (Supp. II) 211a. Although Congress had been informed of the Secretary's interpretation of his powers under that Act (see note 16, *infra*), Congress nonetheless "revisited the Act and left

3. This Court has recognized that the Executive is vested with broad statutory discretion in the denial and revocation of passports. See *Zemel* v. *Rusk*, *supra*; *Perkins* v. *Elg*, 307 U.S. 325, 350 (1939); *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835). In *Zemel*, the Court concluded that the Passport Act authorized the Secretary to refuse validation of all passports for travel to Cuba as a means of protecting the country's foreign policy and national security interests.[15] The Court stated that the Act's "language is surely broad enough to authorize area restrictions,

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the [Secretary's] practice untouched." *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). In these circumstances, the courts must presume that "the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). Accord, *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6; *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).

[15]The Court also held that the Secretary's exercise of discretion was constitutional. 381 U.S. at 13-18. Neither court below addressed respondent's constitutional claims, which are, in any event, insubstantial. Respondent's concession that his activity falls within the terms of the regulation vitiates his claim that the regulation is overbroad or vague. See, *e.g.*, *Parker* v. *Levy*, 417 U.S. 733, 755-756, 759-760 (1974); *United States* v. *Powell*, 423 U.S. 87, 92-93 (1975). Similarly, the challenged regulation does not abridge respondent's freedom of speech. Consistent with the First Amendment, the government may regulate conduct that is seriously damaging to the national security and foreign policy interests of the United States—including the government's compelling interest in preventing disclosures that imperil our foreign intelligence service. See, *e.g.*, *Snepp* v. *United States*, *supra*, slip op. 3 n.3; *Brown* v. *Glines*, No. 78-1006 (Jan. 21, 1980), slip op. 5-10; *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *Zemel* v. *Rusk*, *supra*, 381 U.S. at 13-18. For similar reasons, the regulation does not violate respondent's right to international travel. As the Court remarked in *Califano* v. *Aznavorian*, 439 U.S. 170, 176-177 (1978), "the 'right' of international travel [is] no more than an aspect of the

and there is no legislative history indicating an intent to exclude such restrictions from the grant of authority." 381 U.S. at 8. The Court further observed that the Secretary's construction of the Act was strongly reinforced by the State Department's repeated imposition of area restrictions both before and after the enactment of the Passport Act. *Id.* at 8–11. Such an administrative practice, the Court suggested, was "sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it." *Id.* at 12.

Here, as in *Zemel*, the "language [of the Passport Act] is surely broad enough to authorize" the revocation of respondent's passport (381 U.S. at 8). Moreover, like the restrictions on travel to Cuba, the Secretary's imposition of travel restrictions on respondent is predicated on "the weightiest considerations of national security" and "foreign policy." 381 U.S. at 16, 13. Respondent has conceded that his international travels are intended to harm and are in fact harming the vital interests of the United States. It is also apparent that the Secretary's actions in this case are justified by the government's "compelling interest in protecting * * * the secrecy of information important to our national security." *Snepp* v. *United States*, *supra*, slip op. 3 n.3. See also 8 U.S.C. 1105 (authorizing the Department of State's Bureau of Consular Affairs, which includes the Passport Office, "to

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'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right' * * * can be regulated within the bounds of due process." See also *Califano* v. *Torres*, 435 U.S. 1, 4 n.6 (1978).

maintain direct and continuous liaison with the * * * Central Intelligence Agency").

Furthermore, as detailed in Judge MacKinnon's dissenting opinion in the court of appeals (App. A, *infra*, 43a–52a), both prior and subsequent to the enactment of the Passport Act, the Executive has consistently denied and revoked passports on national security and foreign policy grounds. See also note 8, *supra*.[16] Thus, here, as in *Zemel*, " '* * * it could fairly be argued [that the Secretary's power to revoke passports was] adopted by Congress in light of prior administrative practice.'" 381 U.S. at 18, quoting *Kent* v. *Dulles*, *supra*, 357 U.S. at 128. See, *e.g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, No. 78–1651 (Feb. 20, 1980), slip op. 23–24; *Lorillard* v. *Pons*, 434 U.S. 575, 580–581 (1978).

Kent v. *Dulles*, *supra*, does not suggest a contrary conclusion. *Kent* did not involve foreign policy or national security concerns or even any "plainly harmful conduct." 357 U.S. at 126. Rather, as the Court ex-

[16]The Executive has expressly informed Congress of its passport issuance and revocation policy on several occasions. See, *e.g.*, *U.S. Passports, Denial and Review: Hearings on H.R. 9991 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 12–13 (1956); *The Right to Travel: Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess., Pt. 2, 72–73, 75, 343–350 (1957); H.R. Rep. No. 2684, 85th Cong., 2d Sess. 2–3 (1958) (quoting message of President Eisenhower); *Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings on H.R. 13760 Before House Comm. on Foreign Affairs*, 85th Cong., 2d Sess. 32, 63 (1958); *Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before Senate Comm. on Foreign Relations*, 85th Cong., 2d Sess. 23, 25 (1958). See also App. A, *infra*, 43a–52a.

43a

plained in *Zemel*, "the issue * * * in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations." 381 U.S. at 13. Because the passport applicants' communistic beliefs did not pose an "imminent danger to the public safety" and because the Secretary's "scattered rulings" with regard to communists were "not consistently of one pattern" (357 U.S. at 128), the Court concluded that the Secretary lacked statutory authority to deny the passport applications. In this case, by contrast, the administrative practice is well documented, and the Secretary revoked respondent's passport not because of his political beliefs, but because his international travel activities are—as respondent acknowledges—seriously damaging the foreign policy and national security of the United States.[17]

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[17]The court of appeals offered the suggestion (App. A, *infra*, 16a) that the government might indict respondent and then revoke his passport. To be sure, the government may deny a passport to an applicant who is "participating in illegal conduct [or] trying to escape the toils of the law * * *." *Kent* v. *Dulles*, *supra*, 357 U.S. at 127; *Zemel* v. *Rusk*, *supra*, 381 U.S. at 13. See 22 C.F.R. 51.70. It is not at all apparent, however, that such revocation need be predicated on the formal institution of criminal proceedings. More important, such a limited basis for denying and revoking passports does not adequately protect the national security and foreign policy interests of the United States.

Not all conduct that harms or is likely to harm the vital interests of this country constitutes criminal conduct. For example, respondent's future conduct with regard to Iran is too speculative a basis for a criminal prosecution at this time. Likewise, the decision of an American citizen living abroad to travel to another country to assassinate a foreign leader or overthrow a foreign government may not violate any domestic criminal statute. Moreover, as the Court recently recognized, prosecution of a person such as respondent "would subject the CIA and its offi-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1980

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cials to probing discovery into the Agency's highly confidential affairs. * * * When the Government cannot secure its remedy without unacceptable risks, it has no remedy at all." *Snepp* v. *United States*, *supra*, slip op. 8.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1125

PHILIP AGEE

v.

EDMUND S. MUSKIE, SECRETARY OF STATE,
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(D.C. Civil Action No. 79-3491)

Argued March 14, 1980

Decided June 27, 1980

Before: MACKINNON, ROBB and WALD, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBB.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

ROBB, *Circuit Judge:* In this case Philip Agee challenges a regulation relied on by the United States De-

partment of State to revoke his passport. The District Court declared the regulation invalid for lack of congressional authorization and restored the passport. We affirm.

Appellee Philip Agee, a United States citizen and a former employee of the Central Intelligence Agency (CIA), presently resides in Hamburg, West Germany. Agee is a leading critic of the CIA's clandestine operations throughout the world. He has written and spoken extensively attacking American intelligence efforts, and has purportedly revealed the identities of certain undercover CIA agents. Agee was issued a United States passport, No. Z3007741, on March 30, 1978, with an expiration date of March 29, 1983. However, the United States Department of State, aware of Agee's activities and perhaps believing that they took on special significance because of the Iranian crisis[1] and the recent unrest in other Islamic countries, moved to revoke his passport.

On December 23, 1979 the United States Consul General in Hamburg delivered to Agee a letter from the Department of State notifying him that his passport was immediately revoked and should be surrendered. The letter invoked the authority of 22

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[1] An article in the *New York Post* on December 17, 1979 reported that Agee would be invited to visit Iran and serve on an "international tribunal" created by Ayatollah Khomeini to pass judgment on the prisoners held in the American Embassy in Tehran. Agee denied being "invited to Iran by its government, The Revolutionary Council, or any representative thereof . . ." (J.A.98), but resolution of this factual dispute is irrelevant to our decision. *See* note 3 *infra*.

C.F.R. §§ 51.70(b)(4) & 51.71(a)(1979). 22 C.F.R. § 51.70(b)(4)(1979) provides:

> A passport may be refused in any case in which:
>
> The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States . . . .

22 C.F.R. § 51.71(a)(1979) states:

> A passport may be revoked, restricted or limited where:
>
> The national would not be entitled to issuance of a new passport under § 51.70 . . . .

According to the State Department letter

> The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

(J.A. at 13). The letter also informed Agee of his right to administrative review, and the Department of State

subsequently offered him a hearing on an expedited basis. Agee rejected this option, however, and on December 31, 1979, he sued Cyrus Vance, who was then Secretary of State, in the District Court. The complaint sought declaratory and injunctive relief.

Agee's complaint challenged the revocation of his passport on five grounds: (1) that 22 C.F.R. § 51.70(b)(4) has not been authorized by Congress and is therefore invalid; (2) that 22 C.F.R. § 51.70(b)(4) is impermissibly vague and overbroad; (3) that the revocation of his passport prior to a hearing violated his Fifth Amendment right to procedural due process; (4) that the revocation of his passport violated his right to travel—a liberty interest protected by the Fifth Amendment; and (5) that his passport was revoked in order to punish him and suppress his criticism of government policy in violation of the First Amendment. In proceedings before the District Court on January 3, 1980, Agee's counsel, for the purposes of attacking the Secretary's authority to adopt and apply 22 C.F.R. § 51.70(b)(4), conceded the truth of "the charges as they are made in the letter to Agee." (Tr. at 16). On January 18, 1980 the case was orally argued to the District Court on cross-motions for summary judgment.

By Memorandum and Order dated January 28, 1980 the District Court granted summary judgment to Agee and ordered the restoration of his passport. The District Court concluded that "[t]he Secretary of State's power to revoke or limit a passport flows from Congress not from the President" and "[h]is power is no greater than Congress may choose to delegate to him."

Accordingly the court held that 22 C.F.R. § 51.70(b)(4) is invalid because "the Secretary's promulgation of the challenged regulation was without [express or implied] authorization from Congress." On January 29, 1980 the Secretary of State filed a notice of appeal from the District Court's decision, and by Orders dated February 4 and 5, 1980 this court granted the Secretary's motion for a stay pending appeal.

As authority to promulgate and enforce 22 C.F.R. § 51.70(b)(4), the Secretary of State relies on the Passport Act of 1926, 22 U.S.C. § 211a (1976), which at the time the regulation was adopted in 1968 provided that:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other persons shall grant, issue, or verify such passports.[2]

In *Kent v. Dulles*, 357 U.S. 116 (1958), the Secretary of State had denied two passport applications

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[2] Section 211a was amended in 1978 by the addition of the following language:

> Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where

pursuant to a regulation promulgated in reliance on 22 U.S.C. § 211a. The regulation prohibited the issuance of passports to members of the Communist Party or to persons who "engage in activities which support the Communist movement" or "are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement." *Id.* at 117–18 n.l. The Supreme Court held that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment," and, therefore, "[i]f that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 125, 129. Further, the Court stated that it would "construe narrowly all delegated powers that curtail or dilute [the right to travel]." *Id.* at 129. The Court held that Congress did not give the Secretary of State "unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose", and that the only grounds for refusing a passport "which it could fairly be argued were adopted by Congress in light of prior administrative practice" were "relate[d] to citizenship or al-

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there is imminent danger to the public health or the physical safety of United States travellers.

22 U.S.C. § 211a (Supp. II 1978).

By Executive Order No. 11295 (August 5, 1966), 31 Fed. Reg. 10603, the Secretary of State was "designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority conferred upon the President by the first section of the Act of July 3, 1926 (22 U.S.C. 211a), to designate and prescribe for and on behalf of the United States rules governing the granting, issuing, and verifying of passports."

legiance on the one hand or to criminal or unlawful conduct on the other." *Id.* at 127–28. The Court explained that:

> The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." 32 Stat. 386, 22 U.S.C. § 212. Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States.

Id. at 127. Thus, the Court, observing that the State Department rulings concerning Communists were "scattered" and "not consistently of one pattern", concluded that the regulation employed to deny passports to members and supporters of the Communist Party lacked congressional authorization and was therefore invalid. *Id.* at 128–30.

In *Zemel v. Rusk*, 381 U.S. 1 (1965), the Supreme Court considered the validity of an area travel ban imposed by the Secretary of State to prohibit travel to Cuba by all United States citizens. The Court reasoned that the language of 22 U.S.C. § 211a "is surely broad enough to authorize area restrictions, and there

is no legislative history indicating an intent to exclude such restrictions from the grant of authority." *Id.* at 8. Noting that area restrictions were imposed on numerous occasions both before and after the Passport Act was adopted in 1926, the Court held that the ban on travel to Cuba was valid because there was "an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it." *Id.* at 8–12. In addition, the Court stated that, unlike the denial of the passport applications in *Kent v. Dulles, supra*, "the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant [i.e., political beliefs or associations], but rather because of foreign policy considerations affecting all citizens." *Id.* at 13.[3]

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[3]The dissent emphasizes this reference in *Zemel v. Rusk* to "foreign policy considerations", as well as the Supreme Court's statement that "the restriction which is challenged in this case is supported by the weightiest considerations of national security [as] is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months." 381 U.S. at 13, 16. The dissent suggests that *Zemel v. Rusk* upholds passport revocations on foreign policy and national security grounds in the broad sense of those terms. In our view, however, *Zemel v. Rusks* holds only that, in light of the extensive history of executive imposition of area restrictions on travel, such restrictions are valid because they have received congressional authorization. *See id.* at 8–12. The heart of the *Zemel* opinion is the Supreme Court's statement that "[t]his ca[illegible] therefore not like *Kent v. Dulles, supra*, where we were unable to find . . . an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it." 381 U.S. at 12. Although the Secretary's 1961 ban on travel to Cuba assuredly involved foreign policy and national security considerations, so too did the Secretary's denial of passports to Communist party members and sympathizers pursuant to 22

C.F.R. § 51.135, which was struck down in *Kent v. Dulles*. Rather than broadly validating passport revocations on foreign policy and national security grounds, *Zemel v. Rusk* merely sustained one means of satisfying those concerns—the imposition of area restrictions—because it had been "implicitly approved" by Congress.

The dissent also notes the Supreme Court's citation in the *Zemel* opinion of 22 U.S.C. § 1732, which directs the President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of "any citizen of the United States [who] has been unjustly deprived of his liberty by or under the authority of any foreign government." The *Zemel* Court stated:

> It also cannot be forgotten that in the early days of the Castro regime, United States citizens were arrested and imprisoned without charges. We think, particularly in view of the President's statutory obligation [under 22 U.S.C. § 1732], that the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.

381 U.S. at 15. The dissent argues that 22 U.S.C. § 1732 authorized the revocation of Agee's passport as part of the President's efforts to free the Americans held hostage in Iran. However, in revoking Agee's passport, the Secretary did not rely on 22 U.S.C. § 1732 and, in fact, made no mention whatsoever of the Iranian crisis. According to the letter that Agee received from the Department of State, the Secretary relied only on 22 C.F.R. §§ 51.70(b)(4) & 51.71(a) as authority for his action, and the sole reasons offered for his decision were that:

> Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

(J.A. at 13). Thus, 22 U.S.C. § 1732 is not germane to this case.

This court has also considered the issue of congressional authorization for administrative actions impacting on the right of international travel. In *Woodward v. Rogers*, 344 F. Supp. 974 (D.D.C. 1972), *aff'd without opinion*, 159 U.S. App. D.C. 57, 486 F.2d 1317 (1973), this court summarily affirmed the District Court's holding that there existed neither explicit nor implicit statutory authority for requiring an oath of allegiance as a prerequisite to the issuance of a passport. The District Court said:

> While an Oath of Allegiance may, indeed, have been included on the passport application for an extended period, travel abroad until recently was not conditioned upon the possession of a passport, with the exception of limited periods of international hostilities or national emergency. Moreover, there has been no evidence introduced establishing an open and highly published practice of denying applicants passports for simply refusing to swear to or affirm the Oath. Under these circumstances, this Court is extremely reluctant to conclude that Congress, in reenacting the passport legislation in 1952, indicated a clear intention to authorize the Secretary of State to establish the Oath requirement as a prerequisite to the exercise of a citizen's constitutionally protected right to travel. Indeed, the Supreme Court has made it plain that only the clearest of such evidence will permit this Court to consider Congressional silence to be a substitute for explicit and affirmative legislative action in limiting the free exercise of important rights.

344 F. Supp. at 985. In *Lynd v. Rusk*, 128 U.S. App. D.C. 399, 389 F.2d 940 (1967), this court held that the Secretary of State could not withhold a citizen's

passport for failure to give assurance that he would not travel without a passport to those countries where the Secretary had designated travel to be inimical to the nation's foreign policy. The court reasoned that "[a]lthough Congress has approved administrative action intended to limit travel to restricted areas through the means of restricting passports, . . . it has not made travel to restricted areas a crime and added possible deprivation of liberty as a sanction for achieving this objective"; and thus the court concluded that there was no "basis for inferring that Congress has given the Secretary the authority to deny legitimate, constitutionally protected travel, merely because that is a technique which provides greater assurance of hindering travel to designated areas." 128 U.S. App. D.C. at 405, 389 F.2d at 946.

In summary, as the case law makes clear, the Secretary of State must demonstrate that Congress has authorized 22 C.F.R. § 51.70(b)(4) either by an express delegation or by a "sufficiently substantial and consistent" administrative practice to warrant finding the implied approval of Congress.

The Secretary argues that the Passport Act of 1926, 22 U.S.C. § 211a, interpreted consistently with the President's power to protect national security and conduct foreign affairs, authorizes the revocation of Agee's passport under 22 C.F.R. § 51.70(b)(4), especially in light of Agee's concession for purposes of his summary judgment motion that his activities seriously damage the national security and the foreign policy of the United States. However, the Passport Act does not expressly authorize the Secretary to deny or re-

voke a passport on national security or foreign policy grounds, and no subsequent legislation relating to passports has explicitly delegated such authority. In fact, in 1958 and in 1966 the Department of State unsuccessfully sought this precise power from Congress,[4] and in 1978 Congress limited the Secretary's discretion, as upheld in *Zemel v. Rusk, supra,* to impose area restrictions on travel.[5] To be sure the failure to enact the legislation sought by the Department of State and the contraction of executive power over area restrictions do not conclusively signify congressional disapproval of 22 C.F.R. § 51.70(b)(4); but neither do they support the Secretary's construction of 22 U.S.C. § 211a as a broad delegation of authority to regulate. Moreover, with regard to the inherent foreign affairs power of the executive, the Supreme Court emphasized in *Baker v. Carr,* 369 U.S. 186, 211 (1962), that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance", and we reaffirm what this court stated in *Lynd v. Rusk, supra:*

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[4]S. 4110, 85th Cong., 2d Sess. (1958), introduced by Senator Green at the request of the Secretary of State, would have permitted the denial of passports to persons whose activities or presence abroad would "seriously impair the conduct of the foreign relations of the United States" or would "be inimical to the security of the United States." H.R. 14895, 89th Cong., 2d Sess. (1966), introduced by Representative Hays, would have sanctioned the refusal or revocation of a passport if "the Secretary determines that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." Both these bills died in committee and were never brought to a vote.

[5]*See* note 2 *supra.*

> [I]n the cases before us the Secretary does not press any claim that he has an "inherent" authority, and contends his action is valid under the Passport Act of 1926. It is not insignificant that the *Zemel* opinion, supporting the Secretary, did not rely on an inherent authority. We think any claim of inherent authority would fall afoul of the Supreme Court's warning in *Kent v. Dulles*, 357 U.S. 116, at 129 (1958), that as freedom to travel is part of the "liberty" protected by the Fifth Amendment, "if that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress."

128 U.S. App. D.C. at 403, 389 F.2d at 944.

The Secretary contends that past administrative and legislative practice also confirms congressional approval of his authority to deny or revoke passports on the basis of "serious damage to the national security or the foreign policy of the United States." However, the Secretary details only one instance in twelve years in which 22 C.F.R. § 51.70 (b) (4) was employed to revoke a passport,[6] and only five refusals of passport applications, two prior to the passage of the Passport Act of 1926 and three during the mid-1950's, which were even arguably for national security or foreign policy reasons.[7] Regardless of whether Congress was aware

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[6] In 1970 the passports of Charles McKissack, attorney for Mrs. Mary Sirhan, and his assistant were revoked pursuant to 22 C.F.R. § 51.70(b)(4) as they were preparing to leave the United States, and they were unsuccessful in their attempts to enjoin the revocations. (Br. for Appellant at 46).

[7] In 1906 a passport was denied to an American citizen who had traveled to China and become notorious as a promoter of gambling and prostitution. In 1907 a passport was denied to Nelken Waldberg, an American citizen living in Cairo, who "was

of these scattered examples when it adopted the Passport Act in 1926 and other travel control legislation in 1941, 1952, and 1978, such evidence hardly amounts to a "substantial and consistent administrative practice" demonstrating implied congressional authorization for the challenged regulation. Until Agee's case arose 22 C.F.R. § 51.70(b)(4)) was virtually unused.

In addition, the Secretary relies on a series of statutes, regulations, proclamations, orders and advisory opinions dating back to 1856, most of which concern

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engaged . . . in blackmailing projects, and was disturbing, or endeavoring to disturb, the relations of this country with the representatives of foreign countries." *Id.* at 37–38.

Colonel Hubert Julian, whose activities include supplying arms to various countries, was denied a passport in 1954. In 1955 two passport applications were refused because the applicants' participation in political affairs abroad had become an internal problem to the foreign governments involved. *Id.* at 46; (Rep. Br. for Appellant at 17 & n. 15). In addition, the Secretary notes that the statistics provided to the Senate Foreign Relations Committee during hearings in 1957 showed that, apart from numerous "passport refusals for security reasons" that were related to 22 C.F.R. § 51.135, the Communist regulation held invalid in *Kent v. Dulles*, twenty-one passport applications in 1955 and ten passport applications in 1956 were refused because the applicants were "participants in political affairs abroad whose activities were deemed harmful to good relations and persons whose previous conduct abroad has been such as to bring discredit on the United States and cause difficulty for other Americans (gave bad checks, left unpaid debts, had difficulty with police, etc.)." (Br. for Appellant at 44); *Department of State Passport Policies, Hearings before the Senate Committee on Foreign Relations*, 85th Cong., 1st Sess. 38–40 (1957).

The rationale for these passport denials, however, appears only tenuously related to 22 C.F.R. § 51.70(b)(4)'s concern with "serious damage to the national security or the foreign policy of the United States."

the power of the executive to refuse passports to persons engaged in criminal conduct and to restrict or condition the issuance of passports during time of war or national emergency;[8] but such measures are inapposite and unpersuasive on the issue of implicit authority to invoke national security or foreign policy considerations during peacetime. *See Kent v. Dulles, supra* at 128. Further, as illustrated by the Supreme Court's decisions in *Kent v. Dulles, supra* at 127, and *Zemel v. Rusk, supra* at 8, the criterion for establishing congressional assent by inaction is the actual imposition of sanctions and not the mere assertion of power. "[O]nly the clearest . . . evidence [of past administrative and legislative practice] will permit this Court to consider Congressional silence to be a substitute for explicit and affirmative legislative action in limiting the free exercise of important rights." *Woodward v. Rogers*, 344 F. Supp. at 985. Such proof is lacking here.

We conclude that 22 C.F.R. §51.70(b) (4) was promulgated by the Secretary of State and enforced against Agee without the requisite express or implied authorization of Congress.[9] The Secretary may not revoke Agee's passport unless Congress has authorized him to do so, for "the right to travel abroad" is constitutionally protected and subject to regulation only "pursuant

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[8] *See, e.g.*, Public. L. No. 65–154, 40 Stat. 559 (1918); Pub. L. No. 77–114, 55 Stat. 252 (1941); Pub. L. No. 82–414, 66 Stat. 190 (1952); Pub. L. No. 95–426, 92 Stat. 971 (1978); 23 Op. Atty. Gen. 509, 511 (1901); Proclamation No. 1473, 40 Stat. 1829 (1918); 17 Fed. Reg. 8013 (1952).

[9] Because we so hold, we need not consider Agee's constitutional attacks on the regulation and its application to him based on the First and Fifth Amendments.

to the law-making functions of the Congress." *See Aptheker v. Secretary of State*, 378 U.S. 501, 505 (1964); *Kent v. Dulles*, *supra* at 129.

The decisions of the Supreme Court would permit the revocation of Agee's passport if he were indicted or otherwise charged with criminal conduct,[10] but he has not been charged with any violation of law. The State Department's letter revoking his passport makes no such charge. Under the decisions it is not enough, absent a formal allegation of criminal activity, that Agee's conduct may be considered by some to border on treason. We are bound by the law as we find it.

The judgment of the District Court declaring 22 C.F.R. § 51.70 (b) (4) invalid and ordering the restoration of Agee's passport is affirmed, and the stay pending appeal is vacated.

So ordered.

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[10]*See* Kent v. Dulles, *supra* at 127-28. 22 C.F.R. § 51.70(a)(1) (1979), provides for the denial or revocation of a passport if "[t]he applicant is the subject of an outstanding Federal warrant of arrest for a felony, including a warrant issued under the Federal Fugitive Felon Act (18 U.S.C. 1073). . . ."

In Sneep v. United States, 48 U.S.L.W. 3527, 3529 & n. 3 (U.S. Feb. 19, 1980) (Nos. 78-1871 & 79-265), Mr. Justice Stevens observed in his dissent that "Congress has enacted a number of criminal statutes punishing the unauthorized dissemination of certain types of classified information" including "18 U.S.C. § 798, which imposes a prison term of 10 years and a $10,000 fine for knowingly and wilfully publishing certain types of classified information" and 18 U.S.C. § 794, which makes it a criminal offense punishable by life in prison to communicate national defense information to a foreign government." The Secretary, in fact, acknowledges that Agee may be in violation of 18 U.S.C. § 793 because he "has 'communicated' 'to persons not entitled to receive it' 'information relating to the national defense' which could be 'used to the injury of the United States.'" (Br. for Appellant at 23 n.8).

MACKINNON, *Circuit Judge.* (Dissenting) The issue for determination is whether regulations of the Department of State, under which the Secretary of State revoked the passport of Philip Agee, are unconstitutional on their face and as applied. Agee, a former agent of the Central Intelligence Agency (CIA), concedes in this case that his international travel activities "have caused serious damage to the national security and foreign policy of the United States" and that his "stated intention to continue such activities threatens additional damage of the same kind." (App. 9, 29) The District Court held that while such grounds may be adequate to support a passport revocation during an emergency, they are not adequate in "peacetime." (App. 51) This overlooks the significance of the enactment by Congress in 1978 which extended the requirement for passports in emergencies into the peacetime era. It also does not give adequate recognition to the powers of the Executive under the Hostage Act and implicit adoption by Congress in 1978 of prior administrative practice in passport revocations. For this and for other reasons which are demonstrated hereafter, the Secretary of State on the record in this declaratory judgment action is authorized to revoke Agee's passport. It is an unreasonable interpretation of congressional intent to hold that a passport cannot be revoked for one with Agee's propensities to cause serious damage to this nation. No United States Congress would ever intend to require a President to issue a passport to one with Agee's record and intentions. If the decision of the District Court is not to be reversed the least that should be done would be to vacate and remand for the hearings that were never held.

I.

FACTS

A. *Agee's Background—Past Activities.*

Agee is an American citizen who is presently residing in Hamburg, West Germany after having previously been deported from Great Britain, (danger to national security), France, Germany and Holland (endanger Holland). (App. 92); P. Agee, L. Wolf, *Dirty Work: CIA in Western Europe* 286–300 (1978).

When Agee first entered on duty with the CIA as an agent on July 22, 1957, he executed a formal "Secrecy Agreement" with the Agency which included the following undertaking:

> [I]n consideration of my employment by CIA I undertake not to publish or to participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of my employment by the Agency without specific prior approval by the Agency.[1]

(App. 65)

Thereafter, in reliance on Agee's execution of the Secrecy Agreement, the CIA assigned him to highly confidential duties in a trust relationship with the agency. He was given training in CIA clandestine operations, and allowed to enter CIA headquarters where he became personally acquainted with numerous CIA employees who had undercover assignments, many of whom are still active. Agee also was assigned

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[1]The validity of such Agreement was upheld by the Supreme Court in *Snepp v. United States, 48 U.S.L.W. 3527 (U.S. February 19, 1980) (per curiam), rehearing denied, April 14, 1980.*

to serve in undercover assignments abroad. (App. 56–57) He worked in numerous positions of trust in the CIA including one with the Directorate of Operations, and he was permitted to acquire a detailed knowledge of the secret methodology used by the agency to provide cover for its undercover employees and cooperating sources. (App. 57)

As a consequence of personal problems that threatened to expose his CIA affiliation in an undercover position, Agee resigned in November of 1968. (App. 57) In November, 1971 the CIA received its first indication that Agee had embarked on a program to expose CIA intelligence activities when a publication in Uruguay published a letter, purportedly written by Mr. Agee, in which the CIA was accused of interference in upcoming Uruguayan elections.

Subsequently, on October 3, 1974 Agee issued a press release in London as follows:

> Today, I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating; secondly, to seek within the United States to have the CIA abolished.
>
> This effort to identify CIA people in foreign countries has been going on for some time . . . . (Today's) list was compiled by a small group of Mexican comrades whom I trained to follow the comings and goings of CIA people before I left Mexico City.
>
> Similar lists of CIA people in other countries are already being compiled and will be announced

> when appropriate. We invite participation in this campaign from all those who strive for social justice and national dignity.

(App. 58)

Following that announcement Agee continued to engage in a world-wide program designed to expose CIA activities and personnel. In doing so he resorted to publications, personal appearances and press conferences throughout the world, including London, Sweden, Denmark, Jamaica, and Cuba. He was quoted or interviewed on the same subject in newspapers or by the television media in Portugal (concerning CIA agents in Angola), Spain, Holland, Rome (concerning CIA activities in Switzerland), Bolivia, Australia and New Zealand. (App. 58–61) At the time of these disclosures Agee allegedly admitted some of them and some were credited to him by the publishers or writers without his confirmation. When the CIA's Athens Chief, Richard Welch, was murdered by Greek Terrorists in December, 1975 some CIA officials reportedly blamed Agee's activities in part. (App. 92)

In 1978, Agee participated in the publication of a book entitled, *Dirty Work: CIA in Western Europe* (1978). In the book's introduction Agee stated he intended, by participating in the publication, to create opposition to the CIA by publishing the identities of CIA employees. The book claims reliance on a number of "official publications" but also asserts "use of other, less public information from within several American embassies, and other sources as noted . . ." *Id.* at 319. The book contains an Appendix of 415 pages that purports to list and describe a large number of undercover

CIA employees. (App. 61, 66–75) There is no record that Agee ever made a request to be released from the terms of his Secrecy Agreement. (App. 56) His right to write is recognized, but not his right to violate his Secrecy Agreement and disclose information vital to the national security of the United States.

B. *The Iranian Crisis.*

We may take judicial notice of the significant facts of the United States' involvement in the present Iranian Crisis. Fed. R. Evid. 201(b), (c), (f). Early in 1979 the Shah of Iran was forced to leave his country. The country soon passed into the hands of a self-styled Islamic Republic, which termed itself "Revolutionary." The person who became the principal figure in the government of the country was a prominent Moslem cleric, and there were a great many quick executions of persons who previously held top positions in the Shah's government. As frequently happens with revolutions, the government that replaced the Shah did not quickly reach maturity and dangerous unrest continues throughout the country, and, principally in the capital city, Tehran.

On November 4, 1979, a severe international crisis developed between the United States and a faction of militant insurgents in Iran who invaded the United States Embassy in Tehran, occupied the entire compound by force, seized over 50 United States citizens who were duly accredited as members of the official United States diplomatic mission to Iran, and confined them in the Embassy. These Iranian terrorists have continued to hold the members of the Embassy staff as

hostages to their unlawful demand that the United States, with whom Iran has no extradition treaty, extradite Mohammad Reza Pahlavi, the Ex-Shah of Iran. The Ex-Shah, suffering from cancer and a bile duct obstruction had been *temporarily* admitted to the United States for a short period in November, 1979 for emergency surgery. The Ex-Shah has long since departed from the United States, and the United States has never acceded to the demand for his extradition to Iran. Nevertheless, the militant insurgents, voicing other nebulous complaints, continue to occupy the United States Embassy and by force and violence to hold captive therein the official staff members of the United States Diplomatic Mission.

The United States took the matter to the International Court of Justice at the Hague where the above facts as alleged by the United States were not contradicted by Iran. That Court of December 15, 1979 was unanimous in issuing an Order which in significant part states:

> However important and however connected with the present case, the inequities attributed to the United States Government by the Government of Iran in that letter may appear to be to the latter Government, the seizure of the United States Embassy and consulates and the detention of internationally protected persons as hostages cannot, in the view of the court, be regarded as something "secondary" or "marginal," having regard to the importance of the legal principles involved. * * *
>
> There is no more fundamental prerequisite for the conduct of relations between states that the inviolability of diplomatic envoys and embassies,

> so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose.

United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 15, 19. On April 4, 1980, the President of the United States announced the severance of diplomatic relations with Iran because of Iran's refusal to release the hostages. On May 24, 1980 the World Court announced its *unanimous* decision declaring Iran to be in violation of international law in holding the hostages.

C. *Agee's Relation to the Hostage Crisis in Iran.*

With this situation existing on December 17, 1979 a newspaper article in the *New York Post* reported that Agee had been invited to travel to Iran in order to participate in a "Tribunal" to help judge the American hostages then being held in Tehran under the conditions described above. (App. 37) It is incorrect to state that the Secretary did not mention the Iranian crisis as the record refers to the "damage . . . found in the recent attacks on the United States [Embassy] . . . *in Iran* . . ." (App. 36) (Emphasis added).

Judicial notice is also taken of the generally known fact that following the overthrow of the Shah those who succeeded to power in Iran conducted so-called revolutionary "Tribunals" which involved many mass trials that almost invariably led to imposition of the death sentence and prompt execution. Fed. R. Evid. 201(b), (c), (f). While there was no assurance that such would be the result of the Iranian tribunal to which

Mr. Agee was invited to attend, he made no prompt public denial of the invitation nor any statement with respect thereto. The Iranian government also professed an inability to guarantee the security of the hostages. This created the gravest concern in the United States for the safety of its citizens who comprised the Embassy staff members being held hostage. (App. 37)

In addition to the situation in Iran, recent attacks on United States embassies also occurred in other Islamic countries, Libya and Pakistan (App. 36), and the United States Ambassador to Colombia was held hostage during the same period by a band of militants in Bogota. The State Department expressed its judgment that the international situation was such that it was likely that other "United States diplomatic facilities, including embassies and consulates, would be taken over by force and that United States diplomats and other nationals would be physically harmed." (App. 37)

Given Agee's prior disclosures of United States' intelligence activities *throughout the world*, and some of the results that were outlined and detailed in the uncontroverted Government affidavit (App. 36–37), the State Department concluded that "Agee's activities have caused and are likely to cause serious damage to the national security and foreign policy of the United States." (App. 37–38) The United States allows its citizens more freedom of expression than any nation in the world, but our Constitution and laws do not require that we assist illegal conduct that adheres to our enemies, causes serious damage to our national secu-

rity, and endangers the lives of our citizens. The State Department was well advised to "mark him well."[2]

D. *The Passport Revocation.*

As the District Court describes the situation:

> "The Department of State, aware of Agee's activities and believing that they took on particular significance in light of the *recent Iranian crisis* and the general unrest in *other areas*, moved to revoke his passport."

(App. 47) (Emphasis added). To revoke his passport, on December 23, 1979 the State Department sent the following letter by cable to the United States consulate in Hamburg, West Germany for delivery to Agee:

> The Department of State has requested the Consulate to inform you that the Department has revoked Passport No. Z3007741 issued to you on March 30, 1978 under the provisions of Section 51.71(a) of Title 22, Code of Federal Regulations.
>
> The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70(b)(4) *that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States.* The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been

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[2] Breathes there the man, with soul so dead,
Who never to himself hath said,
This is my own, my native land!
Whose heart hath ne'er within him burned,
As home his footsteps he hath turned,
From wandering on a foreign strand!
If such there breathe, go, mark him well. . . [etc.]
The Lay of the Last Minstrel, Sir Walter Scott, Canto Sixth, I.

your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. *Your stated intention to continue such activities threatens additional damage of the same kind.*

You are advised of your right to a hearing under Sections 51.80 through 51.105 of the Regulations. A copy of the regulations is enclosed. If you should desire a hearing, you must notify the Consulate within sixty days after your receipt of this notice.

* * *

You are also advised that the Consulate is prepared to receive, on an expedited basis, any evidence you may wish to present on your behalf as to why your passport should be re-instated. This opportunity to present evidence is in addition to your right to a hearing pursuant to the Regulations and is designed to afford you the fullest possible due process.

(App. 13) (Emphasis added)

II.

The Instant Declaratory Judgment Proceedings

As indicated above, the State Department letter (App. 13) advised Agee of his right to a hearing on the revocation of his passport in accordance with the Passport Regulations, 22 C.F.R. §§ 51.80–51.105[3] A

[3] Such Regulations provide every conceivable procedural protection for citizens who are denied passports.

copy of the regulations was enclosed. However, Agee elected not to exhaust his administrative remedies, even though he was advised that the Consulate was prepared on an expedited basis to receive any evidence he desired to present. (App. 13) So instead of appealing the revocation by the Secretary of State, on December 31, 1979 Agee elected to file a complaint in the United States District Court for the District of Columbia against Cyrus Vance, Secretary of State, seeking declaratory and injunctive relief. He should have been required to exhaust his administrative remedy, *Robeson v. Dulles*, 235 F.2d 810 (D.C. Cir.), *cert. denied*, 352 U.S. 895 (1956),[4] or failing that, to make a more adequate record in this case.

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[4] An unanimous *en banc* decision of this Court in *Robeson v. Dulles*, 235 F.2d 810 (D.C. Cir.), *cert. denied*, 352 U.S. 895 (1956), held, in practically identical circumstances to the present case, that a passport applicant was required to exhaust his administrative remedies and, failing that, could not assert the invalidity of the regulation providing for one. *Ct. National Lawyer s Guild v. Brownell*, 225 F.2d 552 (D.C. Cir.), *cert. denied*, 351 U.S. 927 (1956). The Court refused to assume the invalidity of a hearing that had not been held or the illegality of questions which had not been asked. The plaintiffs in both *Kent v. Dulles*, 357 U.S. 116 (1958) and *Zemel v. Rusk*, 381 U.S. 1 (1965) did bring declaratory judgment actions but there was no indication that the Government objected to such procedure. At a minimum a hearing should have been held, if not before the Department of State then before the Court. If the prior administrative practice were held to be insufficient to support the regulation the case should be remanded for further hearing. Failing that, requires one to deal with the sketchy record. However, if the majority considers this record to be adequate, a dissent may point to deficiencies that indicate Agee has not sustained his burden of proving that the Department acted improperly in revoking his passport.

This complaint, which initiated the case presently before the Court, alleges that Agee suffered First and Fifth Amendment violations of his rights under the United States Constitution. It also alleges that Agee is a citizen of the United States residing in West Germany and holds a passport issued on March 30, 1978 to expire on March 29, 1983; that he is a well-known critic of the foreign policy of the United States and the clandestine activities of the Central Intelligence Agency; that on December 23, 1979 his passport was revoked, effective immediately, under the authority of 22 C.F.R. §§ 51.70(b)(4) and 51.71; and that the relevant State Department regulations authorized revocation of passports when:

> (4) The Secretary determines that the national's activities abroad are causing or likely to cause serious damage to the national security or the foreign policy of the United States.

(App. 3); 22 C.F.R. § 51.70(b)(4).

The complaint charges that the revocation of Agee's passport was invalid and unlawful for five-stated reasons and that such revocation caused him irreparable injury.[5] It prayed that the Court (a) declare 22 C.F.R.

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[5]The complaint describes the five reasons and irreparable injury as follows:

a. Revocation for the reasons set out in 22 C.F.R. §51.70(b)(4) has not been authorized by Congress, and is therefore impermissible;

b. 22 C.F.R. § 51.70(b)(4) is vague and overbroad, in violation of the First Amendment;

c. In the circumstances of this case, revocation without prior notice and hearing violates the due process clause of the Fifth Amendment;

§§ 51.70(b)(4) and 51.71 invalid and unconstitutional on their face and as applied to Agee, and (b) withdraw the revocation and restore Agee's passport. (App. 4)

The matter came on for hearing in the District Court on January 3, 1980, at which hearing it was concluded that Agee would file a motion for summary judgment, to which the government would respond. In the course of the January 3rd hearing a colloquy occurred with the court in which Agee's counsel *conceded* on behalf of his client that Agee was "*causing or is likely to cause serious damage to the national security . . .*", (App. 16–17, 29–30), and *intended "to continue such activities"*. (App. 34, 30) (Emphasis added) Agee had often expressed his intention to do just that.

The District Court filed its Memorandum and Order on January 28, 1980 granting Agee's motion for summary judgment and denying the cross-motion of the United States; its judgment was based primarily on a determination that the regulation was invalid. Other

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d. Revocation deprives plaintiff of liberty without due process of law, in violation of the due process clause of the Fifth Amendment;

e. Defendant revoked plaintiff's passport in order to penalize and suppress his criticism of the United States government's policies and practices, in violation of the First Amendment.

7. Revocation of plaintiff's passport has caused and will continue to cause him irreparable injury, including interference with his right to live abroad, his right to pursue his chosen occupation free from unreasonable governmental interference, his right to travel, his right to criticize the policies of the United States of America and of other nations, and his right to live with his family.

(App. 3–4)

issues were not reached. The court stated: "[a]ll that is held here is that because Congress had not acted to grant the Secretary authority, the regulation in issue cannot be upheld." (App. 53)

In reaching this decision the District Court claimed support primarily from *Kent v. Dulles*, 357 U.S. 116 (1958) and *Zemel v. Rusk*, 381 U.S. 1 (1965), from which it concluded: "The Secretary of State's power to revoke or limit a passport flows from Congress not from the President . . . His power is no greater than Congress may choose to delegate to him." (App. 49) As applied to Agee's case, the District Court's decision held that Congress, in authorizing the Preisdent to promulgate passport regulations, did not authorize him by regulation to provide for the revocation of passports of citizens in "peacetime" who are causing or likely to cause serious damage to the "national security" or the "foreign policy" of the United States and intended to continue to cause such damage.

For reasons hereinafter set forth it is submitted that such conclusion misreads congressional intent and *Kent* and *Zemel;* that such decisions support a judgment here holding that the regulations authorizing the revocation of Agee's passport because of the serious damage he was causing and threatening to cause to our national security and foreign relations are constitutional; and that the revocation on such stated grounds was also constitutional.

III.

Statutory Authority for Passport Revocation

The authority for the Secretary of State and consular officials to issue passports "*under such rules as*

the President shall designate and prescribe for and on behalf of the United States" has existed since the first Passport Act was adopted on August 18, 1856, ch. 127, 11 Stat. 60–61. There have been minor amendments to the act but none changed the italicized wording set forth above granting the President the power to prescribe such rules.[6] The same grant of power continues to the present day in 22 U.S.C. § 211a:

> §211a. The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, *under such rules as the President shall designate and prescribe for and on behalf of the United States*, and no other person shall grant, issue or verify such passports . . .[7]

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[6] Subsequent amendments include: Act of March 3, 1863, ch. 79, 12 Stat. 754; Act of May 30, 1866, ch. 102, 14 Stat. 54, R.S. § 4075; Act of June 14, 1902, ch. 1088, 32 Stat. 386; Act of June 4, 1920, ch. 223, 41 Stat. 750–51.

[7] The "Foreign Relations Authorization Act, Fiscal Year 1979," approved October 7, 1978, added a sentence limiting the area restrictions that might be placed on passports.

> "Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers."
>
> Pub. L. No. 95–426, Title 1, § 124, 92 Stat. 971 (1978). Agee's passport was not so restricted and this provision does not relate to the revocation of Agee's passport on

22 U.S.C. 211a (Emphasis added). As the last clause indicates, the original purpose of this act was as much to stop Governors, notaries public, clerks of court and others from issuing passports as to recognize the power in the Secretary of State to issue them. This was a task that "naturally fell to the Department of State, as one of its manifestly proper functions" and had been exercised from the start of the nation. G. Hunt, *The American Passport* 36–42 (1898). However, in recent years the significance of a passport has changed as they came to be required for international travel.

Pursuant to the statutory authority cited above, that passports "may" be issued under rules prescribed by the President, and in accordance with authority lawfully delegated to him by the President,[8] the Secretary of State, on April 4, 1968 issued the regulation referred to in Agee's complaint:

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grounds personal to him that his travel would seriously damage our national security and foreign relations.

[8] "§301. General authorization to delegate functions; publication of delegations

"The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: *Provided*, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be pub-

> § 51.70, Denial of Passports. (a) A passport, except for direct return to the United States, shall not be issued or renewed in any case in which . . .
>
> (4) the Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the *national security* or the *foreign policy* of the United States . . .

Passport Regulations, 22 C.F.R. § 51.70 (1968), 33 Fed. Reg. 5681 (Emphasis added). Subsection (4) has remained substantially unchanged to this date.[9] Agee's basic contention here, which is supported by the deci-

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> lished in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part.

3 U.S.C. § 301, 65 Stat. 713. It was this authority that the President relied upon on August 5, 1966, when he issued Executive Order 11295 prescribing rules governing the granting, issuing and verifying of United States passports and delegating his relevant powers to the Secretary of State. The Executive Order provides as follows:

> By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code, and as President of the United States, it is ordered as follows:
>
> SECTION 1. *Delegation of authority.* The Secretary of State is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority conferred upon the President by the first section of the Act of July 3, 1926 (22 U.S.C. 211a), to designate and prescribe for and on behalf of the United States rules governing the granting, issuing, and verifying of passports. . .

31 Fed. Reg. 10603.

[9]The only change since 1968 is that in the present regulation § 51.70 relates to the *issuance* of passports, and § 51.71 provides "a passport may be revoked, restricted or limited where: (a) the national would not be entitled to the issuance of a new passport under 51.70; . . .", 22 C.F.R. §51.70, 51.71.

sion of the District Court, is that this regulation is invalid "because Congress has not [validly] acted to grant the Secretary [the] Authority . . ." to exercise the authority conferred by said regulations. (App. 53)

The 1856 provision in § 211a, as quoted above which authorizes the President to issue passports "under such rules as the President shall designate and prescribe for and on behalf of the United States", is obviously of sufficient breadth to authorize the promulgation of the questioned rule. It is, however, contended that the statute cannot be construed as broadly as Congress provided because to do so would constitute an unconstitutional delegation of legislative power since the statute (§ 211a) contained no adequate standard. *Kent v. Dulles*, and *Zemel v. Rusk*, decided in 1958 and 1965 respectively, held that the President's authority thereunder ". . .authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice,' *Kent v. Dulles* . . .". *Zemel v. Rusk*, 381 U.S. at 18. It is also contended that there was no administrative practice prior to 1926 of denying passports on grounds that our national security or foreign policy was being or would be seriously damaged.

Such construction of *Zemel v. Rusk*, however, is unwarranted because the Court there *did* uphold the denial of passports to an entire area (Cuba) on the grounds of "national security", 381 U.S. at 16, and "foreign policy considerations", 381 U.S. at 13. The greater power to deny passports to all citizens for a limited area on such grounds necessarily includes the

lesser power to deny a passport to an individual citizen *on the same grounds* where it is *conceded* that his *worldwide activities* have caused serious damage to our national security and foreign policy, and that his stated intention to continue such activities was "likely to cause" additional damage of the same character. (App. 34, 29) This point, however, is not asserted as the rule for decision here, because the Department's administrative history of passport revocation, which was adopted by Congress in its 1978 enactment, supports the regulation and the revocation of Agee's case. No nation should request another nation to aid one of its citizens who admittedly intends to damage its national security and foreign policy.

IV.

The Supreme Court and Passport Revocation

Agee contends that the Supreme Court cases discussing passport denials support his case. However, the two major cases, *Zemel v. Rusk* and *Kent v. Dulles*, actually provide much stronger support for the Government's case. The analysis of this issue must start with the *admission* by Agee that his travel activities have caused serious damage to the national security and foreign policy of the United States and that he intends to continue these activities. Notwithstanding this concession, Agee argues that Congress did not intend, when it authorized the President to issue passports "under such rules as he shall designate and prescribe," that he should be able to promulgate a regulation authorizing the revocation of passports for damage to our national security or foreign policy. On

the basis of these facts, the following discussion will establish that *Zemel v. Rusk* and *Kent v. Dulles* support the presidential power to revoke Agee's passport on two separate grounds, either of which furnishes sufficient grounds to revoke his passport. *Zemel v. Rusk*, 381 U.S. 1 (1965) is analyzed first because it is the most recent case, because it modifies *Kent* to some extent, and because it supports the revocation of Agee's passport without any reliance on the affidavits filed by the parties in this Court.

A. The Cuban Area Passport Restriction in Zemel.

Chief Justice Warren's opinion in *Zemel v. Rusk*, 381 U.S. 1 (1965) followed *Kent* by seven years. *Zemel* clearly distinguishes *Kent* from the kind of facts we have here, and it also holds that passports to designated areas may be denied on *national security* and *foreign policy* grounds. Even though it dealt with an area limitation, it provides support for the position of the Government when applying the same grounds to the revocation of an individual's passport. *Zemel* holds that the Passport Act of 1926 authorized the President to impose area restrictions on travel by United States citizens to Cuba. It distinguished *Kent v. Dulles* on the ground that *Zemel* was based on "national security" and "foreign policy" considerations affecting all citizens and was not based on an applicant's political beliefs or associations. 381 U.S. at 13, 16. The same distinction exists here between *Kent* and *Agee*.

In distinguishing *Kent v. Dulles*, Chief Justice Warren noted that *Kent* involved a passport denial based on the applicant's "political beliefs or associations." 381

U.S. at 13. He referred to *Kent* and pointed out: "[i]n finding that history [prior administrative practice] did not support the position of the Secretary in that case, we summarized that history 'so far as material here'—that is, so far as material to passport refusals *based on the character of the particular applicant* [*Kent*]." *Id.* (Emphasis added) Then he added: "the Secretary [of State in *Zemel*] has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of *foreign policy considerations* affecting all citizens." *Id.* (Emphasis added). Also, most importantly for this case, the *Zemel* Court held that *it was not restricted to relying on pre-1926 adminsitrative practices:*

> Even if there had been no passport legislation enacted since the 1926 Act, the post-1926 history of executive imposition of area restrictions, as well as the pre-1926 history, would be of relevance to our construction of the Act. *The interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute. Udall v. Tallman*, 380 U.S. 1, 16–18; *Norweigian Nitrogen Co. v. United States*, 288 U.S. 294, 315.

381 U.S. at 11 (Emphasis added) The Court then proceeded to uphold the Cuban area passport restriction.

In reaching its conclusion in *Zemel*, the Court also placed strong reliance upon the Hostage Law, 22 U.S.C. § 1732, which has been unchanged as a United States Law since 1868. Act of July 27, 1868, ch. 249, § 3, 15 Stat. 224, R.S. § 2001.

It also cannot be forgotten that in the early days of the Castro regime, United States citizens were arrested and imprisoned without charges. We think particularly in view of the President's statutory obligation to "use such means, not amounting to acts of war, as he may think necessary and proper" to secure the release of an American citizen unjustly deprived of his liberty by a foreign government,[16] that the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.

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[16] R.S. § 2001, 22 U.S.C. § 1732 (1958 ed.), provides:

> "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, *the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release;* and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

381 U.S. at 15 (Emphasis added). Section 1732, as applied in *Zemel*, thus supports the revocation of Agee's passport. When the facts of this case are taken by their four corners it is obvious that the Secretary of State, acting as the President's lawful delegate, has determined that the revocation of Agee's passport is one of the means "necessary and proper to . . . effectuate the release" of the American hostages held captive in Iran. The Hostage Statute fits the present situation in Iran like a glove and, as in *Zemel*, supports the Secretary's denial (or revocation) of a passport. The District Court recognized the Executive's "extraordinary authority to act" under § 1732 and stated that "[i]f [Agee's] activities are detrimental to the hostages in Iran . . . his passport may be cancelled . . ." under § 1732. (App. 53) However, for some unexplained reason the court failed to recognize the strong factual circumstances which bring § 1732 into play as one of the statutes that justifies the revocation.

The factual situation in the instant case furnishes much stronger support for the application of § 1732 than the facts described and relied upon in *Zemel*. United States citizens in Iran are *presently* under arrest and imprisoned without charges. The record before the District Court disclosed some possibility that Agee might participate in a "Tribunal" that would judge these American citizens. His participation may or may not have been a realistic possibility. However, it was a rational conclusion at the time, given the news reports, Agee's renegade character,[10] his past ac-

[10]The Congress recognized in 1918 when it passed the Act requiring citizens to have passports to leave or enter the United

tivities and stated future intentions, and the absence of any public denial that he might participate as reportedly requested by the militants in Iran. The passport revocation may have caused him to *assert* a change of mind.

Section 1732 is broad. Congress authorized the President to use "such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release . . ." of United States citizens who are unjustly deprived of their liberty by any foreign government. The revocation of Agee's passport on national security and foreign relations ground is obviously in pursuit of such objective and is amply supported by § 211a, the cited regulation, and the coextensive authority conferred by § 1732.

The *Zemel* Court also noted "[t]hat the [Cuban area] restriction [on passports] which is challenged in this case is supported by the weightiest considerations of *national security.*" 381 U.S. at 16 (Emphasis added). Reference was made to the prior Cuban missile crisis and Castro's holding of some Americans without charges.[11] While Iran is more distant than

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States that nations in conflict with the United States "will wherever possible employ *renegade Americans* . . . as her agents instead of employing [their nationals] about whom suspicion would easily be excited." H.R. Rep. No. 485, 65th Cong., 2d Sess. 2 (1918) on H.R. 10264 (Emphasis added). The same situation continues to exist. *United States v. Rosenberg*, 200 F.2d 666 (2d Cir. 1952), *sub nom. Rosenberg v. United States*, 346 U.S. 273 (1953).

[11] As is apparent from the Zemel's Petition for Rehearing in the Supreme Court, p. 6–8, these facts were *not* in the *Zemel* record. The Supreme Court in effect took judicial notice of them.

Cuba, the present Iranian crisis evokes many of the same considerations on a *more immediate basis.* In fact, the present forcible occupation of our Embassy in Iran and the holding of our official staff as hostages are more properly considered as an act of war than the situations in the Cuban missile crisis and the prior arrest without charges of Americans in Cuba.[12] None of our Embassy officials were seized or confined in Cuba. The "hostage" situation relied on by the Court in *Zemel* was at best minimal compared to the present situation in Iran. All civilized nations for 2,500 years have treated the persons of diplomatic envoys as inviolable. Thus, the *Zemel* Court's reliance on § 1732 and national security and foreign policy grounds, when applied to the instant case, lead inevitably to the conclusion that the revocation of Agee's passport is authorized by the same considerations.

The disposition that *Zemel* makes of the challenge to the delegation of legislative power is equally applicable to *Agee:*

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[12]The use of force against the official staff of the United States Diplomatic Mission to Iran and the seizure and occupation by force of the United States Embassy in Iran may be said to be an act of war, but no state or condition of war exists without such a declaration by the Congress. 10 M. Whiteman, *International Law* 1 (1968); VI G. Hackworth, *International Law* 163 (1943). A contention with insurgents is not war, 2 H. Lauterpacht, *International Law* (Oppenheim) 167 (6th Ed. 1944), though the instant situation may create doubt as to whether the "contention" at the present time does not extend beyond the insurgents. The present situation in Iran is very similar to that which existed during the early stages of the so-called Boxer Rebellion in China in 1900 before the use of force and troops by the United States. II *Encylopedia Britannica, Micropaedia* 210.

Finally, appellant challenges the 1926 Act on the ground that it does not contain sufficiently definite standards for the formulation of travel controls by the Executive. It is important to bear in mind, in appraising this argument, that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, *Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.*

> "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 324.

This does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice. However, the 1926 Act contains no such grant. We have held, *Kent v. Dulles, supra,* and reaffirm today, that the 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions "which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Kent v. Dulles, supra,* at 128. So limited, the Act does not constitute an invalid delegation.

381 U.S. at 17–18 (Emphasis added). In essence, the *Zemel* Court added another broad ground to the list in *Kent*, discussed *infra*, that the Executive may rely upon to withhold or revoke passports and the *prior administrative practice* of the Secretary supports the revocation of Agee's passport.

B. *History of Administrative Denial of Passport Applications.*

Zemel holds that the interpretation of the Act by the Executive charged with its administration before its 1926 reenactment, *and subsequent thereto*, may both be considered in determining whether Congress will be deemed to have recognized and consented to the exercise of particular authority. This calls for a review of past passport practices to determine "which it could fairly be argued were adopted by Congress in light of prior administrative [executive] practice." *Zemel v. Rusk*, 381 U.S. at 17–18. Interim declarations by Congress are also relevant to this review.

In times of emergency Congress has recognized that certain factors should be taken into consideration in the issuance of passports, i.e., "public safety";[13] "the interest of the United States";[14] "if [the President] deems that the interests of the United States so require";[15] "[promote] . . . the national defense";[16] "inimical to the best interests of the United States";[17]

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[13] Act of May 22, 1918, ch. 81, 40 Stat. 559.

[14] Act of June 21, 1941, ch. 210, 55 Stat. 253.

[15] S. Rep. No. 444, 77th Cong., 1st Sess. 1 (1941).

[16] *Id.*

[17] *Id.*

"needed to insure the national security."[18] Following these declarations, Congress in 1978 continued the passport requirement[19] because the "public safety" so required.[20] The traditional needs of national security had previously been considered in connection with the emergencies legislation.[21] The 1978 Act continued the emergencies passport requirements into the so-called peacetime future.

This brings up the passport practices before and after the 1926 reenactment of § 211a. Even prior to the 1856 Passport Act the Executive issued passports on a discretionary basis.[22] During the Civil War passports were required by an order of the Secretary of State and were denied to those subject to military service without a bond.[23] Passports were also denied to citizens "on errands hostile and injurious to the peace of the country and dangerous to the Union."[24]

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[18] H.R.J.Res. 423, 82d Cong., 2d Sess., 66 Stat. 54, 57 (1952); S.J.Res. 156, 82d Cong., 2d Sess., 66 Stat. 96 (1952); H.J.Res. 481, 82d Cong., 2d Sess., 66 Stat. 137 (1952); H.J. Res. 477, 82d Cong., 2d Sess., 66 Stat. 330, 333 (1952).

[19] 8 U.S.C. § 1185 (b), 92 Stat. 993 (1978).

[20] S. Rep. No. 1168, 94th Cong., 2d Sess. 32–33 (1976).

[21] S. Rep. No. 549, 93rd Cong., 1st Sess. 83–84 (1973).

[22] *See, e.g.*, 2 C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1195 (1945); 3 G. Hackworth, *Digest of International Law* 498 (1942); 3 J. Moore, *Digest of International Law* 919–23 (1906).

[23] G. Hunt, *The American Passport* 49–54 (1898).

[24] 3 Moore, *supra* note 22, at 920. Mr. Seward, Secretary of State in 1861, prescribed this class of people, and informed his Department that it was "strictly enjoined to grant no passport whatever to any person of whose loyalty to the Union you have not the most complete and satisfactory evidence." *Id.*

While national security is more vital in wartime, it is always a matter of major governmental concern.

The Attorney General in 1901 ruled that a passport may be denied in the "discretion" of the Secretary of State, for "an avowed anarchist, for instance."[25] In 1903 President Roosevelt promulgated passport rules which authorized the rejection of applications which would "further an unlawful or improper purpose."[26] In 1906 the Solicitor of the Department of State advised that a passport could be denied to a citizen who had gone to China and became notorious as a promoter of the gambling and prostitution because he "is likely to embarrass the United States."[27] In 1907 the Department approved a decision of the Consul General refusing to issue a passport to one engaged in blackmailing and "disturbing, or endeavoring to disturb, the relations of this country with the representatives of foreign countries."[28] This is a perfect description of Agee's presently stated intention. The Department also asserted the right to deny passports "on high grounds of public policy" and if there "is reason to believe that he will put the passports to an improper or unlawful use."[29]

In 1920 President Wilson's passport rules authorized the Secretary "to refuse [passports] in his discretion"

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[25] 23 Op. Atty. Gen. 509, 511 (1901).

[26] 3 Moore, *supra* note 22, at 902; Rules Governing the Granting and Issuing of Passports in the United States, September 12, 1903.

[27] 3 Hackworth, *supra* note 22, at 498–99.

[28] 1907 Foreign Relations of the United States, Part 2, at 1076, 1080, 1082–83.

[29] *Id.*

to those who were "within a dangerous class."[30] Following the enactment of the 1926 Act, President Coolidge issued new passport rules in 1928. These required applicants to state the object of their trip to each country and furnish proof thereof, and authorized the Secretary to deny passports in his discretion.[31] President Hoover's Executive Order was identical,[32] and President Franklin D. Roosevelt's order was substantially the same.[33] The Passport Division Office Instructions of July 30, 1937[34] set forth examples of persons who could be denied passports under the discretionary power of the Secretary. These included persons guilty of disloyal acts, persons suspected of an intention to commit a crime or otherwise to bring grave discredit on this country, evaders of justice, and "those who wish to go abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States." The 1957 Senate Hearings at 74 set forth two examples of passports denied on the latter ground.

The 1930's was also the period when a number of area restrictions were imposed on the issuance of passports. These included Spain (1936)[35], Ethiopia

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[30] Hearing on Right to Travel, Part 2, Subcommittee on Constitutional Rights, Senate Judiciary Committee, 85th Cong., 1st Sess. 343-50 (1957) (hereafter 1957 Senate Hearings).

[31] Exec. Order No. 4800 (1928).

[32] Exec. Order No. 5860 (1932).

[33] Exec. Order No. 7856 (1938), 3 Fed. Reg. 681.

[34] Passport Division Office Instructions of July 30, 1937 (Abstract of Passport Laws and Precedents, Code No. 7.22).

[35] 3 Hackworth, *supra* note 22, at 533.

(1935)[36], China (1937)[37], Europe (1939)[38], and after World War II, Hungary, Czechoslovakia, Albania, Bulgaria, Communist China, Rumania and the Soviet Union.[39]

The rules issued under the 1941 Act recognized the Secretary's discretion and called for consideration of whether the use of the passport would be "prejudicial to the interests of the United States."[40] In 1947, instructions to consular officers called for passport applications to be referred to the Department wherever the applicant's political activities were "of a character which tends to be inimical to the best interest of the United States or detrimental to international harmony and understanding."[41] From 1948 to 1955 the Department notified all "Bearers of Passports" as follows:

> *Engaging in political affairs in foreign countries*
>
> The Department has always considered that it is improper for American citizens to interfere in the political affairs of foreign countries and in general *has taken such action as ground for refusing passport* and registration facilities to them or extending protection to them.[42]

(Emphasis added)

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[36] *Id.* at 531.

[37] *Id.* at 532.

[38] 4 Fed. Reg. 3892 (1939) (unless the applicant could prove the "imperitiveness" of his proposed travel).

[39] 33 Dept. of State Bull. 777 (Nov. 14, 1955).

[40] 6 Fed. Reg. 6069-70, 6349, 5821 (1941). The 1942 amendments made no change. 7 Fed. Reg. 2590, 3708 (1942).

[41] Foreign Service Serial No. 747 (August 7, 1947) at 5.

[42] State Department Publication, "Information for Bearers of Passports," 1948-1955.

Foreign policy considerations were also made a basis for denying passports in the regulation issued in 1952. This authorized such action when citizens were engaged in activities which would violate laws designed to protect the security of the United States "[i]n order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference."[43] The 1956 amendment of this regulation provided that passports should be denied for activities "prejudicial to the orderly conduct of foreign relations; or . . . prejudicial to the interests of the United States."[44] In 1968 this standard was restated to authorize passport denial for an applicant whose activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States.[45] This regulation has not been changed in the past 12 years, and constitutes the present standard.

The passport practices of the State Department through the years have been fully communicated to Congress. The 150 year precedent of denying passports to those who could interfere with the Secretary carrying out our foreign policy was reported to Congress in 1956, and six examples in 1955 were cited where passports were refused to "participants in political affairs abroad whose activities were deemed harmful to good relations."[46] These six refusals were

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[43] 17 Fed. Reg. 8013 (1952).

[44] 21 Fed. Reg. 336 (1956).

[45] 22 C.F.R. § 51.70 (b) (4).

[46] Hearings on H.R. 9991, Subcommittee No. 1, House Judiciary Committee, 84th Cong., 2d Sess. 12-13 (1956).

called to the Senate's attention in 1957 along with several current denials for travel to certain areas which "would be prejudicial to the foreign policy of the United States. . ."[47] During the same hearings the State Department reported that 166 passports had been refused for "*Security Reasons*" during the 55 month period from February 5, 1951 to August 31, 1952 and from January 1, 1954 to December 31, 1956.[48]

The Senate subcommittee was fully informed of the Department regulations and interpretations, the extent and exercise of departmental discretion[49], and that the regulations merely confirmed Department practice "as far back as you can trace it" of refusing passports to persons who were acting "contrary to the policy of the United States."[50] The Legislative Reference Service of the Library of Congress reported in 1957 that passports were denied to "those on missions adverse to the national interests" and that the political officers in the Department would determine whether travel would be "harmful to the national interests."[51]

Following the 1958 decision in *Kent v. Dulles*, Congress was advised that the Executive had traditionally denied passports where their issuance would be "inimical to United States foreign relations."[52] This prac-

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[47] 1957 Senate Hearings, *supra* note 22, at 73, 128–29.

[48] *Id.* at 40.

[49] 1957 Senate Hearings, *supra* note 22, at 59, 66–68, 75, 101, 164–65, 180–81, 248–49, 266.

[50] *Id.* at 60.

[51] Hearings in S. Res. 49, Subcommittee on Constitutional Rights, Senate Judiciary Committee, 85th Cong., 1st Sess. 175–84 (1957).

[52] H.R. Rep. No. 2684, 85th Cong., 2d Sess, 2 (1958).

tice continued after *Kent*[53] and in 1960 a Congressional Staff Report to the Senate Committee on Government Operations reported

> that the authority to issue or withhold passports has, by precedent *and law*, been vested in the Secretary of State as a part of his responsibility to protect American citizens traveling abroad, and what he considered to be the best interests of the Nation.[54]

(Emphasis added)

Passports have also been denied where the citizen's acts were not illegal but were considered inimical to the interests of the United States. Examples: Colonel Hubert F. Julian (supplying arms to various countries),[55] and Charles Luke McKissack and his assistant (attorneys for Mrs. Sirhan).[56] The Note, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 Yale L.J. 170 (1952) reported several similar well known passport denials: Kamen (a radiation physicist who had *carelessly* disclosed confidential information to a Soviet vice-counsel, *Id.* at 174–76); Isacson (American Labor Party member who

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[53] Hearings on H.R. 13760, House Committee on Foreign Affairs, 85th Cong., 2d Sess. 32, 63 (1958); Hearings on S. 2770, S. 3998, S. 4110, S. 4137, Senate Committee on Foreign Relations, 85th Cong., 2d Sess. 22–23, 25 (1958).

[54] Staff Report, Reorganization of the Passport Functions of the Department of State, Senate Committee on Government Operations, 86th Cong., 2d Sess. 13 (1960).

[55] *Developments in the Law, The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1150 n.76 (1972).

[56] *Sirhan v. Rogers*, No. 70-3965 (S.D.N.Y. Sept. 11, 1970); No. 35364 (2d Cir., Oct. 5, 1970) (attempts to enjoin the revocation denied in both Courts).

proposed to aid the Greek rebels, *Id.* at 176); Robeson (speaking and giving concerts abroad "not in interests of the United States", *Id.* at 176–77); Lamont (left-wing writer, travel "not . . . in the best interest of the United States," *Id.* at 177); Charles E. Davis (spied for Senator Joseph McCarthy on Communists and United States diplomatic personnel "to the prejudice of Switzerland," *Id.* at 178).

In analyzing prior administrative practice it is erroneous to restrict the inquiry solely to revocations since 1968 (App. 50) when the regulation reached its present form. That regulation merely codified the Secretary's long standing interpretation of his authority under the statute since the date of its original enactment in 1856. It is this consistent interpretation of the Act over its entire life that constitutes the prior administrative practice that must be considered. Congress was fully aware of the Department's denials of passports on grounds of national security and foreign policy, it never objected thereto, and it enacted the present law in 1978 requiring passports with full knowledge that the Department would follow its long standing administrative practice applying and interpreting the relevant statutes and regulations.

Therefore, when Congress, with detailed knowledge of the Department's interpretation of its authority and the statute, adopted the present statute in 1978, without altering the existing statutes, it adopted and confirmed the authority of the Executive to continue its prior administrative practice. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 410 (1975); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Zemel v.*

Rusk, 381 U.S. at 12, 18; *Kent v. Dulles*, 357 U.S. 125, 127.

In view of this history it was error for the District Court to conclude that the Secretary, in denying passports on national security and foreign policy considerations through the years, has not followed "sufficiently substantial and consistent administrative practice to warrant the implied approval of Congress." *Zemel v. Rusk*, 381 U.S. at 12. The denial of passports to those who intended to cause serious damage to our national security and foreign policy is the very minimal basis that Congress would expect the Department to follow. Congress has so indicated by its refusal since 1856 to make any change in the basic grant of authority to the President. 22 U.S.C. § 211a. Prior administrative practice therefore under *Zemel v. Rusk* supports the revocation of Agee's passport on national security and foreign policy grounds. Section 1732 is additional support for such revocation.

Finally, in view of Agee's past activities and his admissions here, two additional statutes add support to the Secretary's revocation of Agee's passport on national security grounds. First, Congress recognized in the statute establishing the Central Intelligence Agency that it was "in the interest of *national security*. . ." to "[protect] the intelligence sources and method for unauthorized disclosure" and to maintain "the security of foreign intelligence activities of the United States". 50 U.S.C. §§ 403(d)(3), 403g[57] (Em-

[57] Title 50 U.S.C. § 403 provides:

"(d) For the purpose of coordinating the intelligence activities of the several Government departments and agen-

phasis added). Therefore, revoking Agee's passport in an attempt to stop his disclosure of "intelligence sources and methods," *id.*, is statutorily recognized as being "in the interest of national security."

That national *security* considerations were to be considered in granting or denying passports also derives some support from the Act of June 27, 1952, which provided that the Administrator of the Bureau of Security and Consular Affairs of the Department of State, which Bureau includes the Passport Office, "shall have authority to maintain direct and continuous liaison with the [FBI and the CIA] and with other internal security officers of the Government for the purpose of obtaining and exchanging information for use in enforcing the provisions of this Chapter[58] *in the interest of the internal security of the United States.*" 8 U.S.C. § 1105, (66 Stat. 174–175, 91 Stat. 847).

It thus appears that *Zemel* greatly expands *Kent*'s illegal conduct grounds, see V, *infra*, and provides additional authority for the revocation of passports on

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cies *in the interest of national security*, it shall be the duty of the [Central Intelligence] Agency, under the direction of the National Security Council . . . (3) . . . That the Director of Central Intelligence shall be responsible for *protecting intelligence sources and methods* from unauthorized disclosure . . ." (Emphasis added).

Section 403g provides:

"In the interests of the *security* of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." (63 Stat. 211)

[58] 8 U.S.C. § 1185(b), requiring passports of citizens, is part of the "Act" referred to. Cf. 66 Stat. 175, 190.

national security and foreign policy grounds where such action is consistent with historical administrative practice.[59] Revoking Agee's passport, and thereby hopefully halting the illegal and dangerous release of intelligence sources and methods throughout the world is clearly within the interests of national security. Therefore, the Secretary's action in the instant case was authorized by Congress and was lawful.

V.

KENT V. DULLES ANALYZED AND DISTINGUISHED

Agee contends that *Kent v. Dulles*, 357 U.S. 116 (1958), does not support revocation on national security or foreign policy grounds. That case, however, is not authority on such point because the Court never discussed such grounds notwithstanding the argument in its dissent, that *such grounds were present.*[60] *What is of significance here is that Kent did recognize that*

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[59] 22 U.S.C. § 1732 provides additional authority.

[60] The contention is made that the denial of passports in *Kent* "to communist party members and sympathizers" "assuredly involved foreign policy and national security considerations" the same as the Cuban area ban. While *Kent* may have *"involved"* some such "considerations," the record was deficient in *proof* that the issuance of passports without non-communist affidavits would *cause or be likely to cause serious damage to our national security or foreign policy.* The ideological factors also created additional constitutional overtones that could not be surmounted. *Kent* involved denial of passports on ideological grounds, weakly asserted. In contrast, Agee's passport was revoked because of acts *admittedly* damaging to the national security; which he conceded were likely to continue. Also, in *Kent* the government never had a hostage situation to bring § 1732 into play as the Court did in the Cuban situation, and as we have here with our embassy hostages in Iran.

passport revocation is authorized when the applicant has engaged in conduct that is "illegal" or in "violation of the laws of the United States." Id. at 127.

The record before the District Court indicates instances of illegal conduct in violation of 18 U.S.C. § 793(d). This is sufficient under *Kent* to support the passport revocation. In addition, the McMahon and Agee affidavits before *this Court* indicate additional illegal conduct of a very serious nature. This decision does not rely on these additional violations but because of their serious nature they are not overlooked and are discussed in the Appendix in the event that his conduct receives further consideration. (App. 89–98) The serious damage to our national security and foreign policy which is present in the record before the District Court, and is conceded, also involves "illegal conduct."

Kent was denied a passport by the Government, in accordance with the then existing regulations, which required an applicant to submit an affidavit stating whether he was then or ever had been a communist. When Kent refused to submit such an affidavit, his passport application was denied and he brought a successful suit for declaratory relief. The Supreme Court upheld his claim and ruled that "freedom to travel is . . . an important aspect of the citizen's 'liberty'". 357 U.S. at 127.

The opinion stated that the power granted the President by Congress did not extend to denying passports for refusal to file such affidavits. In the course of reaching that conclusion the Court denied several areas in which Congress *had authorized*

passports to be denied. First, naturally, was when citizenship or allegiance did not exist.

> Second, was [when] . . . the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States.

Id. at 127. The Court also stated that in the light of prior administrative practices those two categories were the only ones which it could fairly be argued were adopted by Congress when Congress reenacted the statute in 1926. *The Court, however, did observe that one can find in the records of the State Department "rulings of subordinates covering a wider range of activities than the two indicated." Id.* at 128. However, consideration need not be taken here of such communist activities. The Court merely refused to give the Secretary of State "unbridled discretion" to grant or withhold a passport from a citizen for any substantive reason he may choose. *Id.* Withholding passports on national security and foreign relations grounds is not an exercise of "unbridled power." After explaining that the refusal to a non-communist affidavit did not relate to citizenship or allegiance on the one hand, or to criminal or unlawful conduct on the other, the Court ordered the issuance of the passport.

Kent did not involve serious damage to the national security of the foreign policy of the United States. The Court said "[w]e deal with beliefs, with associations, with ideological matters." *Id.* at 130. Agee does not present a case that deals with beliefs, associations or ideological matters. Rather Agee's *acts* cause serious

damage to our national security and foreign policy, and such conceded damage involves *illegal conduct.* Thus, *Kent v. Dulles* is important for its recognition that passports may be denied where the person was participating in *illegal conduct* which would violate the laws of the United States. 257 U.S. at 127. This brings to the fore an analysis of Agee's acts that constitute illegal conduct.

A. *Illegal Conduct Under Kent v. Dulles as a Gounds for Passport Revocation.*

In this case Agee has conceded that his actions "have caused serious damage to the national security and foreign policy of the United States" and that "[his] stated intention to continue such activities threatens additional damage of the same kind." (App. 13, 30) From the facts that the court may consider under judicial notice, Fed. R. Evid. 201(b), (c), (f), and the affidavits filed in the District Court, it may also be concluded that in causing "serious damage to the national security and foreign policy" Agee has been, and is, "participating in illegal conduct . . . which would violate the laws of the United States". 357 U.S. at 127. He has also stated his intention "to continue such activities" which, it will be demonstrated, violate our laws.

In developing this point it should first be noted that the case now before this Court is a *de novo* separate judicial proceeding and not a direct appeal from an administrative decision where the reviewing court is limited strictly to the factual and legal considerations upon which the administrative action was based. Cf. *Securities and Exchange Commission v. Chenery*

Corporation, 318 U.S. 80, 87 (1943). It is thus permissible on this appeal to rely upon facts set out in the uncontradicted affidavits of record in the District Court, the concessions of appellant, the conclusions of law and fact admitted by the parties in *this proceeding*, and any fact of which judicial notice may be taken because it is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b), (c), (f).

Agee's complaint alleges that "exhaustion of administrative remedies is not required . . ." (App. 4), and he did not exhaust his administrative remedies. He thus avoided cross-examination, but also lost whatever advantage might accrue to him from this Court being limited to the administrative record. While a bare bones decision can be rendered on the limited facts in this record, the case would have better presented the issues if the Department hearing had been held, or if the trial court had held an evidentiary hearing, or if the Government had taken Agee's deposition, because "the facts as viewed by the administrator's expert eye may provide guidance to a court in reaching constitutional determinations. . . ." *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir. 1974). *Cf. Robeson v. Dulles*, *supra* note 4. His deposition might also have provided further illuminating facts as to his conduct and intentions. However, the record is sufficient to support the revocation of his passport for the "illegal conduct" which is involved in his past disclosure of secret CIA information in violation of the applicable criminal statute.

The most striking example of Agee's illegal conduct is seen under the Wilful Communication of Defense Information statute. 18 U.S.C. § 793(d). This statute provides:

> "Whoever, lawfully having possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits, or causes to be communicated . . . [etc.] . . . the same to any person not entitled to receive it . . . shall be fined . . . or imprisoned. . ."[61]

The record indicates that Agee, by his disclosures throughout the world of the identity of undercover CIA agents, and CIA sources and methods, 50 U.S.C. § 403(d)(3), *supra*, has clearly violated 18 U.S.C. § 793(d). Such disclosure of the identities of the agents, or CIA sources and methods, in each foreign country would support a separate indictment. The District Court could have concluded from the record that Agee committed such offense, thus justifying revoca-

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[61] 18 U.S.C. § 793(d) provides:

> (d) Whoever, lawfully having possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it . . . [s]hall be fined . . . or imprisoned . . . or both. (64 Stat. 1003).

tion of his passport under *Kent*. A draft indictment is set forth in the margin.[62]

B. *The Relationship of the Passport Regulation to Illegal Conduct.*

The District Court remarked that: "If Agee is indicted for any violation of law, his passport may be cancelled". (App. 53) Agee argues that any criminal conduct cannot support the revocation of his passport on national security and foreign policy considerations unless they comply with a separate Passport Regulation which authorizes revocation for crimes in certain stages of prosecution. The regulation referred to provides that passports shall not be issued, except for direct return to the United States, where there is an

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[62] *Transmitting Injurious Defense Information*, 18 U.S.C. § 793(d)

The Grand Jury charges:

That Philip Agee, a former intelligence agent of the Central Intelligence Agency of the United States (hereinafter CIA), having lawful possession of information relating to the national defense of the United States, to wit, information identifying ___ and ___ and ___ and ___ as intelligence agents of the CIA assigned to *(Nation)*, which information relates to and is an integral part of the United States' defense and which the said Agee had reason to believe could be used to the injury of the United States and to the advantage of a foreign nation, did, on or about the day of , 19 , at a public press conference in the city of ___, *(Nation)*, wilfully communicate, deliver and transmit and cause to be communicated, delivered and transmitted, and attempt to communicate, deliver and transmit and attempt to cause to be communicated, delivered and transmitted the aforesaid information relating to the national defense of the United States to the Government of ___, in violation of 18 U.S.C. § 793(d).

outstanding Federal warrant of arrest for a felony, where parole or probation conditions would be violated or the applicant has been committed to a mental institution, where extradition is sought from a foreign country, or where a subpoena to the passport applicant involves a Federal prosecution or a grand jury investigation. 22 C.F.R. § 51.70(a)(1) to (5).[63] The underlying theory of Agee's contention with respect to this regulation is that it exhausts the circumstances under which illegal conduct may constitute grounds for denying passports. However, such regulation merely provides several specific grounds for denying passports and under *Kent v. Dulles*, 357 U.S. at 127, does not foreclose denying passports for citizens who are "otherwise engaging in conduct which would violate the laws of the United States." *Id.*

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[63] 22 C.F.R. § 51.70(a)(1) to (5) provides:

> (a) A passport except for direct return to the United States, shall not be issued in any case in which:
>
> (1) The applicant is the subject of an outstanding Federal warrant of arrest for a felony, including a warrant issued under the Federal Fugitive Felon Act (18 U.S.C. 1073); or
>
> (2) The applicant is subject to a court order, or conditions of parole, or conditions of probation forbidding his departure from the United States; or
>
> (3) The applicant is subject to a court order committing him to a mental institution.
>
> (4) The applicant is the subject of a request for extradition or provisional arrest for extradition which has been presented to the government of a foreign country.
>
> (5) The applicant is the subject of a subpoena issued pursuant to section 1783 of Title 28, United States Code, in a matter involving Federal prosecution for, or grand jury investigation of, a felony.

Kent describes those "trying to escape the toils of the law" only as *one group* who might be denied passports. The enumeration of circumstances in subsections (a)(1) to (5) all involve persons that may be characterized as being in that group. The process of the courts has proceeded further with respect to those covered by subsections (a)(1) to (5), but that enumeration is by no means exclusive and *Kent* recognizes that just "participating in illegal conduct" may support a passport denial. *Id.* It is thus clear that illegal conduct need not be formally processed to the stage of indictment, arrest warrant, subpoena, extradition or court order to constitute grounds for denial of a passport.

Since criminal conduct involving "national security" or "foreign relations considerations" constitutes "illegal conduct" and "[violations of] the laws of the United States," *Kent* recognizes that such conduct may serve as grounds for denying passports even though actual formal criminal charges have not been laid or are not in the process of being prosecuted in some formal manner. *The Government need not proceed against every law violator by formal means in order to prove in some separate proceeding that his conduct was illegal.* Prosecution of offenders is declined in many instances where laws are violated, as in the case of grants of immunity. It would be absurd to hold that because an admitted criminal was given prosecutorial immunity to act as a witness in securing the conviction of other greater criminals, the Government was thereby foreclosed from denying him a passport by proving in a separate passport proceeding that he had violated the United States criminal laws as

conceded by his own testimony. Declining prosecution because it would involve the disclosure of informants or classified matter is another example. Also, law violators are frequently permitted to continue without prosecution for a considerable period of time because their surveillance produces evidence of other criminal violations, such as continuing espionage involving others.

The present factual situation is one where the failure of the Government to proceed against a wrongdoer on criminal grounds does not preclude its ability to use civil and other remedies. *See United States v. Kearns*, 595 F.2d 729, 732 (D.C. Cir. 1978) (*civil* prosecution of officer of Export-Import Branch for breach of fiduciary duty).

The regulation authorizing the refusal of passport applications where the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States, provides a non-criminal basis for denying passports. The lynchpin to this entire discussion is that Agee's clearly *illegal conduct* also damaged the national security. Thus, the passport revocation was legal under *Kent*, and under § 51.70.

This analysis likewise disposes of the contention that there is some bar to revoking Agee's passport because the Attorney General at some earlier date allegedly stated that the Department of Justice did not intend to bring formal criminal charges against him.

VI.

THE PRESENT STANDARD FOR THE ISSUANCE OF PASSPORTS UNDER THE STATUTE REQUIRING PASSPORTS

Generally throughout the history of the United States citizens have *not* been required to have passports to enter and leave the country. However, there have been several exceptions. First, an 1815 enactment during the War of 1812 required passports. Act of February 4, 1815, ch. 31, § 11, 3 Stat. 199. Second, during the Civil War passports were required by order of the Secretary of State. The third exception occurred during World War I when Presidential Proclamation No. 1473 (40 Stat. 1829), under the Act of May 22, 1918, 40 Stat. 559, made it unlawful to leave or enter the United States without a valid passport. This later Act was effective only in wartime but it was amended in 1941 so it could be applied prior to our entry in World War II. Act of June 21, 1941, ch. 210, 55 Stat. 252–53. See the President's Proclamation No. 2523 of November 14, 1941, 55 Stat. 1696. That emergency continued until April 28, 1952 and was then extended until April 1, 1953 (66 Stat. 54, 57, 96, 137, 330, 333). Next, the Act of June 27, 1952, Pub. L. No. 414, ch. 2, § 215 (b), 66 Stat. 190, authorized the President by Proclamation to require citizens to have passports for foreign travel. It was under this Act that citizens' passports were subsequently required, which authority was scheduled to expire on September 14, 1978.

Each of these instances in our nation's history, when passports have been *required* of our citizens to leave

or enter the country, came into force to protect our national security and foreign policy. It was in that climate that passports were to be issued, denied or revoked. Congress' *modus operandi* when it required passports during those periods is significant. In each of those four instances it *never* explicitly provided any standards in the Act that should be followed by the Executive in issuing or refusing to issue passports. Yet, surely Congress implicitly intended that the Executive would apply national security standards in issuing and denying passports. Otherwise, if passports were to be issued to all citizens willy-nilly, the object in requiring passports would be practically meaningless. Thus, the fact that Congress did not specifically provide standards for revocation in the statute requiring passports indicates that Congress recognized the Executive as possessing such power without a more specific Congressional delegation.

All this is relevant to the present situation because *again* in 1978, Congress in the troubled world situation then existing, again provided by amendment to the 1952 Act, *supra*, that passports were required for all citizens leaving or entering the United States:

> "(b) Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

8 U.S.C. § 1185 (b), Act of October 7, 1978, Pub. L. No. 95–426, 92 Stat. 993. The Conference Committee Report on the bill states that the above enactment

made permanent the authority of the President to require American citizens to bear valid passports when entering or leaving the United States and preserved the authority that had previously been exercised on an "emergency basis" from otherwise lapsing in September, 1978.[64]

This whole case turns on the Congressional intent which is indicated by the enactment of this 1978 statute because *that is the present law.* Much of the discussion of the parties as to the intent of earlier Congresses and the effect of earlier court decisions becomes *passe* because of this latest enactment. The intent of Congress in the present law is expressed in the Senate Committee Report on the bill:

> The committee recognizes clearly that the passport *authority should not be restricted in any way which would limit the President's ability to control the departure of U.S. citizens to foreign countries when such travel is inconsistent with a greater government interest,* such as preventing a citizen who is seeking to avoid the judicial processes of the United States. Nor would the committee wish to limit the President's ability to deter U.S. citizens from entering countries with which the United States is at war or *regions where there are occurring hostilities which relate to American foreign policy interests.*

S. Rep. No. 842, 95th Cong., 2d Sess. 14 (1978) (Emphasis added). It is obvious that Agee is interested in travelling to countries where hostilities are occurring which directly relate to American foreign policy inter-

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[64] Conference Report on H.R. 12598, H.R. Rep. No. 1535, 95th Cong., 2d Sess. 44 (1978).

ests. In addition, a passport may be denied if Agee's right to travel is inconsistent with "a greater government interest." When that standard is applied the answer is also obvious. The authorization of Agee to travel is clearly inconsistent with, and is outweighed by, the greater government interest of protecting our national security and foreign policy from the serious damage that Agee concedes he intends and which the record indicates he causes. (App. 36–37) Our foreign policy cannot stand much further damage, particularly since Agee is presently directing his attention in Iran and the near East where the vital interests of our nation are most seriously hazarded.

It should also be noted that the 1978 Act delegates legislative authority over the issuance of passports essentially on the same basis as § 211a, i.e., the same degree of discretion. The two statutes are *in pari materia*—they both authorize the President to promulgate passport regulations—and are to be read together. Thus, the deference due the long standing administrative construction of the President's power under § 211a applies to the same delegation in § 1185 (b). The fact that Congress followed the same pattern as § 211a, and gave no indication of its dissatisfaction with the extent of the authority exercised by the President under that section, enhances the conclusion that Congress adopted the prior administrative practice and intended to authorize the Secretary to continue the same practices. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 410 (1975); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974); *Zemel v. Rusk*, 381 U.S. 1, 18 (1965); *Kent v. Dulles*, 357 U.S. 116, 125, 128 (1958).

The Secretary of State thus conforms to the intent of Congress, and therefore acts constitutionally, when he revokes a passport under the regulation on the factual circumstances that Agee presents.

VII.

Congressional Silence as Legislative Intent

It is argued that Congress has not enacted any of the bills that were introduced in Congress to provide the Executive with specific statutory authority to deny passports when their issuance would cause serious damage to our national security or foreign policy, and that such Congressional silence indicates that Congress thereby intended to withhold such authority. However, there is a total absence of any specific expression by Congress that in any way indicates any such intent.

Thousands of bills are introduced in every Congress that never see the light of day, like those that were *not* enacted here. The 95th Congress had over 25,000 bills introduced. Yet, less than 650 were enacted into public laws. Persuasive congressional intent cannot ordinarily be discerned from "mere silence". *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235, 241 (1970). *See also United States v. Bd. of Commissioners of Sheffield*, 435 U.S. 110, 135, 149 (1978) ("it is impermissible to draw inferences of approval from the unexplained inaction of Congress"); *Girouard v. United States*, 328 U.S. 61, 69 (1946) ("[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."); *NLRB v. Plasterers' Local Union*, 404 U.S. 116, 129–30 (1971).

Here, no bill ever reached the floor in either house. The mere failure of any legislative body to enact a bill that never reaches a floor in most instances is nothing more than "sound and fury, signifying nothing." Several senators expressing opposition do not constitute congressional intent. Very few laws pass unanimously. Most bills have some opposition. Generally, as here, there are too many variants between the contents of such bills and a pending legal question to convert congressional inaction into the substance of a declared intent. In other instances there is no clear expression by Congress. Then too, subsequent enactments and developments, as here following *Kent*, and its modification (of Agee's interpretation) by *Zemel*, can create substantive changes that materially affect the construction of a statute.

VIII.

Additional Constitutional Challenges

Agee raises three additional challenges to the Secretary's action: (1) violation of the Fifth Amendment's right to travel, (2) violation of the First Amendment, and (3) violation of his right to procedural due process. Each of these contentions has been considered fully and none of them warrant setting aside the revocation of Agee's passport. Since they were not discussed by the District Court nor by this Court there is no necessity to consider them further in this opinion.

Conclusions

The Passport Regulations, §§ 50.71 (b) (4) and 51.71, which authorize the denial of passports to prevent

serious damage to our national security and foreign policy are constitutional on their face, and are constitutional as applied to Philip Agee on the record in this *de novo* declaratory judgment action, in which the existence of such serious damage is conceded.

First, 22 U.S.C. § 1732, with its wide grant of authority to the President in hostage situations, on the authority of *Zemel v. Rusk*, 381 U.S. 1 (1965), authorized the revocation of Agee's passport as part of the President's efforts to free the Americans held hostages in Iran and the conduct our foreign policy.[65] The District Court correctly perceived the possible rele-

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[65] It is incorrect to say that the Executive did not rely on § 1732 in revoking Agee's passport. He relied on the regulation and the regulation encompassed all functions relating to passports. In issuing the regulation the Secretary specifically relied on "sec. 4, 63 Stat. 111" (see below). Section 1732 clearly contemplated such a function. The "extraordinary authority" (App. 53) conferred by § 1732 in hostage situations is clearly a "function" conferred on the Secretary of State and, being *in pari materia* with the passport statutes, is available to support the revocation. In applying a rule or regulation it is a misconception of Executive authority for a court to overlook the power conferred by the underlying statute. This may expand or restrict the regulation. Moreover, the District Court in referring specifically to § 1732 did consider the implications of that statute. (App. 53) Section 1732 does confer "extraordinary authority" in hostage situations and is sufficient alone to uphold the revocation. Its force is buttressed by § 211a and § 1185 and prior administrative practice.

Section 4 of 63 Stat. 111 provides:

> Sec. 4. The Secretary of State may promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in the Secretary of State or the Department of State, and he may delegate authority to perform any of such functions to officers and employees under his direction and supervision.

vance of this statute but did not give full effect to the facts which justify its use to support the instant passport revocation.

Second, Justice Douglas' opinion in *Kent v. Dulles*, 357 U.S. 116, 127 (1958) supports the constitutionality of the denial of passports generally, and Agee's in particular, for the "illegal conduct" involved in Agee's violations of 18 U.S.C. § 793 (d). It is frosting on the cake that such illegal acts also cause serious damage to our national security and foreign policy and thus provide additional support for revocation under the regulation.

Third, *Zemel v. Rusk* supports the denial of passports on "national security" and "foreign policy" grounds and such denial is consistent with prior administrative practice.

Fourth, in the three instances in 1861, 1918 and 1941, when passports were required to protect our national security and foreign policy, no change was made in the President's authority which was first recognized by the Act of August 18, 1856, 11 Stat. 60–61. Congress again in 1978 required citizens to have passports for foreign travels. In enacting such law the Senate Committee Report on the Act of August 18, 1978, indicated additionally that passports may be denied by the Executive on national security and foreign policy grounds "when such travel is inconsistent with a

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Reliance on this statute in the promulgation of the questioned regulations indicates that all relevant "functions" of the Secretary were incorporated into the regulations. And note 8, *supra*, describes the President's delegation to the Secretary of all power under 22 U.S.C. § 211a.

greater government interest." It is clear here that to issue a passport to a citizen who admittedly has caused and intends to cause serious damage to our national security and foreign policy, and is capable of doing so, would be inconsistent with the "greater government interest" in avoiding serious damage to such vital interests of the nation. There are relatively few United States citizens who have the same capability and vicious intent to damage our national security as has Mr. Agee. And his particular brand of hate, i.e., alleged CIA activities, is presently at the very core of the Iranian "problem" with the terrorists' demand that the Embassy staff be tried as "spies."

To the extent that the foregoing differs from the majority opinion I respectfully dissent.

APPENDIX

Illegal Conduct by Agee as Indicated by Affidavits Filed in This Court on Appeal

In addition to the record before the District Court, this Court has before it an affidavit filed in the District Court by the Government the day after the District Court released its decision. Three days later on February 1, 1980 the Government filed another affidavit in this Court in support of its Motion for Stay Pending Appeal. The Agee affidavit filed in reply states that the two Government affidavits were read to him. His answering affidavit is very brief and does not contradict a great many very serious allegations concerning his personal actions. Such uncontradicted allegations must therefore be considered as having been admitted. Because of their possible future relevance to

Agee's passport they should not be overlooked, and accordingly are analyzed and commented on below.

After Agee was advised that his passport had been revoked, his affidavit to this Court indicates he stated publicly for the first time that he had not intended to visit Iran until the hostages were released. (App. 84, 98)

> At [the same] time Agee announced that *he had suggested to the Iranian terrorists that they should release the hostages in exchange for all CIA records on CIA intelligence operations in Iran for the past 25 years.* In that connection Agee offered to assist the terrorists in analyzing such documents. According to newspaper accounts the terrorists rejected Agee's offer. Nevertheless, Agee, since that time, is reported to have specifically suggested to the terrorists that he would travel to Iran after the hostages were released. Since it is known that the terrorists obtained Embassy documents when they ransacked the Embassy, Agee's travel to Iran even in the eventuality that the hostages are released, would enable him to do an on-the-spot analysis of the possibly classified documents the terrorists currently possess.

Affidavit of John N. McMahon, Deputy Director for CIA operations. (App. 84–85) (Emphasis added).

It is submitted that the uncontradicted facts alleged in these affidavits indicate several instances of serious illegal conduct by Agee. Set forth below are the outlines of several "*national security and foreign policy*" violations of United States laws by Agee which are indicated in the affidavits filed in this Court. They are in addition to the § 793 (d) violation and each violation

constitutes serious damage of the character conceded by Agee's admission. Under *Kent v. Dulles*, any violation of law may support a passport revocation. It is not required that the violation be formally charged. *See* V, B, *supra*.

A.

The Definitional Criminal Statutes.

Before detailing such offenses, reference is made to three statutes in the United States [Criminal] Code that are fundamental and applicable to all crimes.

First, 18 U.S.C. §2 (a) provides that

> "Whoever commits an offense against the United States or aids, abets [or] counseis . . . its commission, is punishable as a principal." (65 Stat. 717).

This statute has very broad implications and applies to all federal crimes.

Second, 18 U.S.C. § 7 (3)[66] defines the "special maritime and territorial jurisdiction of the United

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[66] 18 U.S.C. § 7(3) provides:

> The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:
>
> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

This definition includes an exercise of the power conferred on Congress "[t]o define and punish . . . Offences against the law of Nations." U.S. Const. art. I, cl. 10. *United States v. Rodgers*, 150 U.S. 249 (1893); *United States v. Flores*, 289 U.S. 137, 153 (1933). The law of Nations consists of the body of rules and prin-

States" as used in the United States Criminal Code to extend to

> "Any lands . . . acquired for the use of the United States, and under the . . . concurrent jurisdiction thereof . . ." (66 Stat. 589).

By virtue of this provision the United States Embassy in Tehran, Iran is within the "special" territorial jurisdiction of the United States. The ground occupied by a United States Embassy is not officially United States territory, IV G. Hackworth, *International Law* 564 (1942), but such premises are subject to the concurrent jurisdiction of the United States criminal laws to the extent indicated by our laws and decisions. An opinion by Judge Craven of the Fourth Circuit in *United States v. Erdos*, 474 F.2d 157, 159-60 (4th Cir. 1973) *cert. denied*, 414 U.S. 876, held with respect to a felony committed in the United States Embassy in Guinea, that 18 U.S.C. § 7 (3) grants "Special . . . territorial jurisdiction" with respect to federal crimes committed in an embassy in a foreign country acquired for the use of the United States and under its concurrent jurisdiction. The United States Embassy in Tehran obviously satisfies these requirements.

Criminal statutes addressing conduct that causes direct injury to the United States Government, and which is capable of perpetuation without regard to particular locality, are applicable to United States citizens in foreign countries, even though the statute does not so expressly declare. *Skiriotes v. Florida*, 313

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ciples of action which are binding upon civilized states in their relations with one another. J. Brierly, *The Law of Nations* 1 (6th Ed. 1976). It is presently described as International Law.

U.S. 69, 74 (1941); *United States v. Bowman*, 260 U.S. 94 (1922). The laws of the United States follow its subjects "everywhere." *United States v. Furlong*, 14 U.S. (5 Wheat.) 184, 197 (1820). The Supreme Court has refused to rule out the validity of applying United States laws to citizens of foreign countries who act illegally against the United States in foreign countries. *United States v. Bowman, supra.*

The third statute, 18 U.S.C. § 11, provides that the term "foreign government" as used in the United States Criminal Code includes any "faction, or body of insurgents". The Terrorists holding the American Embassy and hostages within Iran therefore constitute a "foreign government."[67]

With these basic definitions applicable to the crimes proscribed by the United States Criminal Code, it appears from the affidavits that Agee has violated several United States criminal statutes, in addition to 18 U.S.C. § 793 (d). These additional violations are outlined below.

B.

Illegal Conduct and Violation of United States Laws by Agee.

(1) Forbidden Intercourse with Foreign Governments (The Logan Act), 18 U.S.C. §§953, 11. This and

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[67] 18 U.S.C. § 11 provides:

§ 11. Foreign government defined

The term "foreign government", as used in this title except in sections 112, 878, 970, 1116, and 1201, includes any government, *faction, or body of insurgents* within a country with which the United States is at peace, irrespective of recognition by the United States.

the three remaining offenses are based on the affidavits filed in this Court. (App. 80–100)

Agee is quoted as stating that "in recent weeks" prior to December 23, 1979 he proposed to the "militants" in Iran (who obviously under 18 U.S.C. § 11 are a "faction and body of insurgents" constituting a "foreign government") that they should compel the United States to "exchange . . . the C.I.A.'s files on its operations in Iran since 1950 for the Captive Americans." (App. 94, *Cf.*, 97 ¶ 3)[68] Such conduct violates 18 U.S.C. § 953 which prohibits any citizen of the United States from carrying on correspondence or in-

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(Emphasis added). This statute is also authorized by U.S. Const. art. I, cl. 10. See n. 66, *supra*, and text at pp. 51–52.

[68]The affidavit in this court of John N. McMahon, CIA Deputy Director of Operations refers to a *New York Times* article, 24 December 1979, quoting Agee, that in the "recent weeks" prior to December 23, 1979, he

> "proposed to the Iranian government, *to the militants occupying the American Embassy in Tehran* and to [others] . . . *that the quickest solution to the crisis would be an exchange of the CIA's files on its operations in Iran since 1950 for the captive Americans.*"

(App. 94) (Emphasis added). Agee is also quoted as having said that he "will not become involved in identifying CIA personnel or in analyzing documents *until after all the hostages are released. This I am sure is known by Mr. Vance because my proposals have not been secret.*" *Id.* (Emphasis added). Agee's affidavit, filed in "February, 1980," as part of these proceedings, but after the District Court decision and opinion (App. 97–98), denies that he was ever "invited to Iran *by its government, The Revolutionary Council*, or any representative thereof, for the purpose of sitting on any tribunal whatsoever, or for any other reason . . ." (App. 98) (Emphasis added). As sweeping as this appears, it does not actually rule out the possibility that he was invited by the "militant" insurgents who the *Iranian Government* professedly could not control. They had threatened the hostages with trial and execution and Agee told the reporter

tercourse with any foreign government (the Iranian terrorist faction) "with intent to influence [its] measures or conduct or [that] of any . . . agent thereof."[69] Agee's violation of this act with the Terrorists is self evident from his own uncontradicted statement. A draft indictment is set forth in the margin.[70] (His

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that *he had talked with the "militants"* in *"recent weeks"* prior to December 23, 1979. (App. 84-85, 93-95) If Agee was not even *invited* by the "militants" then his admitted conversations with them take on the possibility of even more severe criminality on his part as it would support the possibility that *he initiated* the contact with the militants in which he proposed that they secure the CIA records by extortion. Agee is responsible for the undeveloped nature of such facts. If he had elected to go to the hearing the State Department offered, such facts could have been brought out by cross-examination or by a deposition in the judicial proceeding. However, his passport was not revoked solely because he might have intended to go to Iran, but because his world-wide activities had caused, were causing, and were likely to cause serious damage to the national security and foreign policy of the United States throughout the world, including Iran. (App. 13)

[69] 18 U.S.C. § 953 provides:

> § 953. Private correspondence with foreign governments
>
> Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than $5,000 or imprisoned not more than three years, or both . . . . (62 Stat. 744)

[70] *Unlawful Intercourse with Foreign Government (Logan Act)*

The Grand Jury charges:

From on or about the 4th day of November 1979 until on or

communication with the "Iranian Government" (App. 94) could furnish the basis for an additional count.)

(2) The Treason Statute, 18 U.S.C. § 2381. The treason statute makes it an offense to "adhere [ ] to

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about the 24th day of December, 1979, *(an Iranian)*, and *(an Iranian)*, and a large group of other Iranians whose names are to the Grand Jury unknown, hereinafter referred to as "Iranian Terrorists", constituted a "foreign government" as defined by 18 U.S.C. § 11, in that they were a faction and body of insurgents within Iran, a country recognized by the United States and with which country the United States was at peace; that during the aforesaid period Philip Agee, herein charged as the defendant, a citizen of the United States, then in the vicinity of Hamburg, Germany, did, without authority of the United States, directly and indirectly carry on correspondence and intercourse with the aforesaid body of insurgents constituting a foreign government and with officers and agents thereof, with intent to influence the measures and conduct of said foreign government and of the officers and agents thereof in relation to disputes and controversies between said foreign government and the United States, and to defeat the measures of the United States in such disputes and controversies, in that within a few weeks before the 23rd day of December 1979, the said Philip Agee did, communicate, correspond, and have intercourse with the aforementioned Iranian Terrorists by counselling, and suggesting to them, in relation to their dispute and controversy with the United States that they could prevail in their unlawful demands on the United States by forcing the United States contrary to the authority thereof, by extortion, to deliver into the possession of the aforesaid Iranian Terrorists constituting said foreign government, certain United States property, to wit, all records of the Central Intelligence Agency of the United States (CIA) on CIA intelligence operations in Iran for the past 30 years, in return for the release by said Iranian Terrorists of upwards of 50 citizens of the United States who were duly accredited to the official staff of the United States Embassy in Tehran, Iran, and who were then being threatened with execution and being unlawfully held and confined within the United States Embassy at Tehran, Iran by force by said foreign government as hostages in its dispute and controversy with the United States; all in violation of 18 U.S.C. §§ 953, 11.

[the] enemies [of the United States], giving them aid and comfort within the United States or elsewhere . . ." 18 U.S.C. § 2381.[71] The Iranian terrorists constitute a militant faction of insurgents in Iran.

Under the Constitution, treason has no territorial limitation and the crime may be committed by an American citizen living outside the United States. *Kawakita v. United States*, 343 U.S. 717 (1952). Adhering to enemies of the United States likewise has no territorial limitation. The overt acts required for treason may be "small . . . minor, not crucial . . . insignificant . . . a casual and unimportant step . . . it may be an abortive attempt; . . . [it may be] minute

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[71] 18 U.S.C. § 2381 provides:

§ 2381. Treason

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000; and shall be incapable of holding any office under the United States. (62 Stat. 807)

The United States Constitution also provides in Article III, Section 3 as follows:

> Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the life of the Person attainted.

. . . remote from the scene of action . . . It is the nature of the act that is important . . . [If the] acts would tend to give the enemy the 'heart and courage to go on with the war,'[72] . . . [that is sufficient for treason]." *Id.* at 738–39, 741–42, citing *Cramer v. United States*, 325 U.S. 1, 28–29, 34 (1944). The death sentence was upheld in *Kawakita*. It follows that a more rigorous standard of proof than is required for treason would *not* be required for a charge of "adhering to [the] enemy." What is proscribed is "adhering to the . . . enemies of their enmity."[73] This aptly describes Agee's adherence.

Here it is clear that Agee's exchange proposal to the Terrorists for obtaining the CIA records showed more than sympathy with the militants. When coupled with his counselled suggestions and offer to assist the militants subsequently in analyzing the CIA records they had acquired, and others that might be obtained through extortion, his offers would be taken by the militants as a clear indication of support and encouragement for their position from an American citizen. It would give the Terrorists "heart and courage" to continue holding the embassy and the hostages to the detriment of the interests of the United States and particularly to the rights of the hostages. It is plain that by such conduct Agee indicated his adherence to the enemies of the United States giving them aid and comfort.[74]

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[72] Lord Chief Justice Treby, in Trial of Captain Vaughan, 13 How. St. Tr. 485, 533.

[73] *Id.*

[74] *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962), held that any act defined by Congress as a crime which does in fact

His offense in its long distance physical aspects, is similar to that of "Orphan Ann", who was possibly also "Tokyo Rose". During World War II she *broadcast* demoralizing propaganda from Japan to American troops in the Pacific and was convicted in the United States Courts under the treason statute for adhering to the enemy by her radio broadcasts. *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). Agee adhered to the enemy by his proposals over the *telephone* in which he admits he suggested to the terrorists that they exchange the American hostages for the CIA's Iranian records.

Charge to the Grand Jury, 30 F. Cas. 1036, 1037 (C.C. Ohio 1861) (No. 18, 272) declares:

> "This language [adhering to the enemies, etc.] leaves no room to doubt that treason may be predicated [on] acts which are not a direct levying of war according to the construction of that phrase . . ."

See United States v. Haupt, 47 F.Supp. 836 (N.D. Ill. 1942), *rev'd on other grounds*, 136 F.2d 661 (1943).[75]

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render assistance to an enemy is sufficient to come within such terminology for purposes of forfeiting veterans benefits. The acts in question were articles written in opposition to the Korean War asserting, *inter alia*, that United States support of the United Nations in Korea constituted "armed intervention", "armed aggression" and "fiendish Lidicies perpetrated by American hands." *Id.* at 904. The Court held the determination must be made in the first instance by the Administrator of Veterans Affairs. Agee's acts here are of greater substance and more direct in assisting the militants than in *Thompson*.

[75] Haupt was retried and convicted again of treason. This conviction was affirmed in *United States v. Haupt*, 152 F.2d 771 (7th Cir. 1946), *aff'd*, *Haupt v. United States*, 330 U.S. 631 (1947), *rehearing denied*, 331 U.S. 864.

However, the seizure and occupation of the American Embassy, the confinement of the Embassy staff of American citizens and holding them as hostages does constitute an *act* of war. See note 12, *supra*. A draft indictment is set forth below.[76]

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[76]*Violation of the Treason Statute*

The Grand Jury charges:

On or about the 4th day of November, 1979, a militant faction and body of insurgents in Iran constituting a foreign government under 18 U.S.C. § 11 were enemies of the United States (hereinafter "enemies"), and on said date said enemies by force and violence unlawfully seized and occupied the United States Embassy in Tehran, Iran and also unlawfully seized and confined against their will over 50 members of the duly accredited official staff of said United States Embassy, and said enemies have continued to date hereof to be enemies of the United States, to unlawfully occupy the entire premises of the said United States Embassy and to threaten with trial and execution and to hold said staff members for reward and otherwise as hostages for their demand that, despite the absence of any extradition treaty, the United States extradite Mohammad Raza Pahlavi, the Ex-Shah to Iran, and that the aforesaid facts and conditions continued to exist between the 4th day of November, 1979 and the 15th day of April, 1980 and thereafter, and that during said period, Philip Agee, herein charged as the defendant, a citizen owing allegiance to the United States, did, in violation of 18 U.S.C. § 2381, within a few weeks before the 23rd day of December, 1979, adhere to the above described enemies of the United States and give them aid and comfort elsewhere than in the United States by counselling and proposing in direct communications from West Germany to the aforementioned enemies of the United States in Iran that they force the United States contrary to the authority thereof, to deliver into their possession, in return for the release by said enemies of said hostages, certain property of the United States, to wit: all records of the Central Intelligence Agency of the United States (CIA) on CIA operations in Iran for the past 30 years; and that to effect the object of the above described violations of 18 U.S.C. § 2381, did and performed the following and other overt acts, to wit:

(3) Kidnapping, 18 U.S.C. § 1201, 11, and 2. The Lindbergh Kidnapping statute, which originally required transportation of the victim in interstate or foreign commerce, has recently been amended. Transportation is no longer an essential element of the crime if the victim is "seized" or "confined" within the "special maritime or territorial jurisdiction of the United States."[77] Since the United States Embassy in Iran, under our federal criminal laws and decisions, is within the "special . . . territorial jurisdiction of the United States," and the kidnapping statute by its terms applies within such jurisdiction, the only question is as to the power of the United States to enforce its laws against individuals who violate United States laws i...

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1. Within recent weeks prior to December 23, 1979 said Philip Agee proposed to the Iranian Government to "exchange . . . the CIA's files on its operations on Iran since 1959 for the captive Americans."

2. Within recent weeks prior to December 23, 1979 said Philip Agee proposed to the militants [the faction and body of insurgents] occupying the American Embassy in [Tehran] to "exchange . . . the CIA's files on its operations in Iran since 1959 for the captive Americans."

[77] 18 U.S.C. § 1201 provides:

> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:
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> * * * * *
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> (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
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> * * * * *
>
> shall be punished by imprisonment for any term of years or for life.

an American Embassy in foreign territory. *United States v. Erdos, supra*, in the Fourth Circuit decided that the federal manslaughter statute applied to an American citizen in the Embassy in Guinea. Here the Iranian citizens are clearly guilty of kidnapping. Regardless of what term may be applied to their acts, kidnapping is a crime in every civilized country.

Since it is an offense under our laws, applying the federal kidnapping statute to the territory comprising the compound of the United States Embassy in Tehran by virtue of an application of the "special . . . territorial jurisdiction of the United States" is within the constitutional grant to Congress: "To define and punish . . . Offences against the law of Nations." U.S. Const. art. I, cl. 10. The constitutional framers intended by this provision to empower Congress to "*define*" as well as to "punish" offenses against the law of nations. 2 M. Farrand, *The Records of the Federal Convention of 1787* 315–16 (1937).

The militants "seized" and "confined" the 50 official staff members of the United States Embassy within the Embassy. This is a direct crime againt the United States. Because the kidnappers are Iranians, and presently outside the reach of United States judicial process, the Iranians in question may never come within the reach of federal judicial power sufficiently for this nation to enforce the "special" territorial jurisdiction that Congress has decreed. However, if they did come within the reach of our judicial power it is most likely that United States courts would uphold their trial and conviction under the constitutional

grant to Congress to "define" and "punish" crimes against the law of nations. U.S. Const. art. I, cl. 10.[78]

In *United States v. Bowman*, 260 U.S. 94 (1922) Chief Justice Taft, in overruling a district court's decision upholding a demurrer to an indictment, remarked:

> The necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.

260 U.S. at 97-98.

In *Bowman* three United States citizens, *and a citizen of Great Britain then resident in Brazil*, were indicted in the United States District Court in the Southern District of New York for conspiring on the high seas, *and in Brazil* as charged in a separate count, to defraud a United States government corporation. The Supreme Court held that criminal statutes that proscribe acts that are directly injurious to the Government and are capable of perpetuation without regard to any particular locality are to be construed as applicable to citizens of the United States on the high

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[78] Newspapers on May 12, 1980 reported that the British Government would prosecute the sole surviving Iranian terrorist who held the Iranian diplomatic staff as hostages for a week in the Iranian Embassy in London. Nevertheless, the Iranian Government indicated, so the news story asserts, that it would seek to extradite the terrorist to Iran. This indicates that the Iranian Government also contends that it has special territorial jurisdiction over offenses by its nationals that are committed in its Embassy in a foreign country.

seas *or in a foreign country,*[79] even though there is no express declaration to that effect. The Court also refused to dismiss the indictment against the British subject, even though he was never aboard the United States ship and his *locus was at all times* within the territorial limits of Brazil.

That international law would permit the United States to prosecute crimes against it because of the "morality and justice" involved was suggested by Justice Cardozo in *New Jersey v. Delaware*, 291 U.S. 361, 383–84 (1934):

> International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality. Lauterpacht, *supra*, pp. 110, 255; Hall, *supra*, pp. 7, 12, 15, 16; Jenks, The New Jurisprudence, pp. 11, 12.

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[79] Cf. *United States v. Flores*, 289 U.S. 137, 155–58 (1933) held, that the United States law against murder on waters "within the admiralty and maritime jurisdiction of the United States" applied to an American citizen on board an American vessel attached to the shore by cable within the Belgian Congo at a point inland 250 miles from the mouth of the Congo River. The concurrent jurisdiction of the local government was recognized, but it was noted that such local jurisdiction was not "asserted" (as here), and that by comity among civilized nations where the offense affected only "the vessel or those helping them" the offense was to be dealt with by the authorities of the nation to which the vessel belonged. The opinion recognizes an exception where the offense disturbs the peace and tranquillity of the local country, but where as here, the local sovereign does not assert its law, it is submitted that comity, as recognized by the order of the International Court of Justice, *supra*, would recognize the declared concurrent jurisdiction of the nation di-

An American citizen (Agee) thus commits a criminal violation of United States laws when he "aids" and "counsels", 18 U.S.C. § 2(a), citizens of a foreign country, under the above circumstances, in their violation of our kidnapping statute on the premises of a United States Embassy where the United States has concurrent jurisdiction. Agee thus became a principal in such kidnapping when he *counselled* the terrorists in their kidnapping violations to demand United States property, i.e., the CIA records, in return for the release of their American captives. A draft indictment is set forth in the margin.[80]

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rectly offended. Under such circumstances there would be no internal force that could prevent the courts of the offended nation from applying their law to its citizens and others who violate its laws and come within the power of its courts to enforce its judgments. Of course, special maritime jurisdiction differs from special territorial jurisdiction.

[80] *Kidnapping*

The Grand Jury charges:

On or about the 4th day of November, 1979, and continuing until the date of this indictment at the compound of the United States Embassy in Iran situated on lands in the City of Tehran, acquired for the use of the United States and under the concurrent jurisdiction thereof, a place within the statutorily defined special maritime and territorial jurisdiction of the United States, (*name of Iran Terrorist*) and (*name of Iranian Terrorist*) and numerous other persons to the Grand Jury unknown, composed a group of Iranian Terrorists, constituting a militant faction and body of insurgents in Iran, herein charged as defendants, did by force and violence unlawfully occupy the said United States Embassy and seize and confine and hold therein for reward and otherwise as hostages to their unlawful demands to extradite the Ex-Shah of Iran from the United States to Iran, despite the non-existence of any extradition treaty between the two nations, over 50 citizens of the United States duly accredited to the official staff of the United States Embassy in

(4) Seditious Conspiracy, 18 U.S.C. § 2384. This statute provides:

> "If two or more persons . . . in any place subject to the jurisdiction of the United States, conspire . . . by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $20,000 or imprisoned not more than 20 years, or both."

Under the law applied in *United States v. Erdos, supra*, the American Embassy in Tehran is a place subject to the special territorial jurisdiction of the United States, 18 U.S.C. § 11. From the statement attributed to Agee it is clear that he conspired with the Iranian Terrorists who were on our Embassy premises to seize by extortion property of the United States, contrary to the authority thereof. The property that was the subject of the conspiracy consisted of Government records, i.e., CIA records covering 30 years of operations in Iran. Such conspiracy between Agee and the Terrorists existed within the "recent weeks" before the 23rd day of December, 1979. As stated above, Agee's statement concedes the facts that constitute this offense (App. 94, i.e., that he counsel-

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Tehran, Iran, in violation of 18 U.S.C. §§ 1201 and 11; and during said period of time Philip Agee, a citizen of the United States, also a defendant herein, did aid, abet and counsel said defendants in their commission of said crimes against the laws of the United States by counselling and proposing that they force the United States contrary to the authority thereof, to deliver into the possession of said Iranian Terrorists, in return for their release of said hostages, certain property of the United States, to wit, all records of the Central Intelligence Agency of the United States (CIA) on CIA operations in Iran for the past 30 years; in violation of 18 U.S.C. §§ 1201, 11 and 2.

led the "militants" to demand the CIA operational records on Iran. A draft indictment is set forth in the margin.[81]

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[81] *Seditious Conspiracy to Commit Extortion*

The Grand Jury charges:

Within the recent weeks before the 23rd day of December, 1979, and thereafter, in a place subject to the jurisdiction of the United States, to wit, the lands acquired for the use of the United States Embassy in Tehran, Iran, which lands are under the concurrent jurisdiction of the United States, Philip Agee, an American citizen and the defendant herein did, with numerous unindicated co-conspirators then present in Tehran, Iran, whose names are to the Grand Jury unknown, hereinafter referred to as "Iranian Terrorists," unlawfully, hereinafter referred to as "Iranian Terrorists," unlawfully, knowingly and willfully conspire together to commit certain offenses against the United States, in violation of the provisions of Sections 2384 and 2 of Title 18, United States Code; in that said Philip Agee and said unindicated co-conspirators did conspire by force to seize, take and possess property of the United States contrary to the authority thereof, i.e., property consisting of records for the past 30 years of the intelligence operations in Iran of the Central Intelligence Agency of the United States, hereinafter referred to as the "CIA", and during the course of the said conspiracy Philip Agee, did aid, abet and counsel the said Iranian Terrorists within the premises of the aforesaid United States Embassy in the unlawful conspiracy described above; and that to effect the object of the above described unlawful conspiracy, the defendants during the course of the aforesaid conspiracy, did and performed the following and other overt acts, to wit:

OVERT ACTS

(1) Within a few weeks before the 23rd day of December, 1979, Philip Agee had a telephone conversation with the aforementioned militant Iranian Terrorists.

(2) Within a few weeks before the 23rd Day of December, Philip Agee counselled the said Iranian Terrorists within the United States Embassy in Tehran, Iran and proposed that some of their illegal objectives could be achieved by forcing the United States of America, contrary to the authority thereof, to

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deliver into the possession of the Iranian Terrorists certain property of the United States, to wit, all CIA records on CIA intelligence operations in Iran for the past 30 years, in return for the release by said Iranian Terrorists of the aforementioned American citizens held as hostages.

(3) The said Iranian Terrorists continued illegally to occupy the premises of the United States Embassy in Tehran, Iran.

(4) The said Iranian Terrorists within the premises of the United States Embassy in Tehran continued to confine by force and violence and against their will in excess of 50 citizens of the United States, all members of the official staff of the United States Embassy in Iran.

(5) The said Iranian Terrorists continued to confine as hostages the same 50 United States citizens and did threaten, and continue to threaten, their trial and execution.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79–3491

PHILIP AGEE, PLAINTIFF,

v.

CYRUS VANCE, DEFENDANT.

MEMORANDUM AND ORDER

This suit involves the validity of a passport regulation.

Agee, a United States citizen and former CIA employee, has for some years travelled abroad on a United States passport. During this period he has continued to write and speak extensively attacking United States intelligence efforts and has purported to reveal names of certain secret agents identified with the CIA. He now resides in West Germany. The Department of State, aware of Agee's activities and believing that they took on particular significance in light of the recent Iranian crisis and the general unrest in other areas, moved to revoke his passport.

On December 23, 1979, the Department notified Agee by letter that his passport was immediately revoked and should be surrendered. As grounds for this action, the Secretary of State ("Secretary") relied on the provisions of 22 C.F.R. §§ 51.70(b)(4) and 51.71,[1]

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[1] These regulations read as follows:

22 C.F.R. § 51.70(b)(4):

asserting specifically his conclusion that Agee's activities abroad "are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." Agee was provided with a statement of reasons supporting the Department's determination,[2] and was informed of his right to an administrative appeal which was subsequently offered on an expedited basis.[3] He rejected this option, and instead by appropriate papers seeks declaratory and injunctive relief from the Court. Agee alleges that the revocation of his passport is invalid because it rests on a

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51.70 *Denial of passports*

(b) A passport may be refused in any case in which:

. . . (4) The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States . . . .

22 C.F.R. § 51.71(a):

51.71 *Revocation or Restriction of Passports*

A passport may be revoked, restricted or limited where:

(a) The national would not be entitled to issuance of a new passport under § 51.70 . . . .

[2]*See* Defendant's Exhibit A, Letter of December 23, 1979. The pertinent paragraph reads as follows:

. . . The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

[3]*See* Defendant's Exhibit B, Letter of December 28, 1979.

regulation which has not been authorized by Congress. In addition, he attacks the constitutionality of the regulation on its face, claiming that it conflicts impermissibly with rights guaranteed under the First and Fifth Amendments to the Constitution. The Court's jurisdiction is established. *See* 28 U.S.C. §§ 1331, 2201 *et seq.*

The matter is before the Court on cross-motions for summary judgment that have been fully briefed and argued on an accelerated schedule. In its current posture, the case presents a pure question of law since, for purposes of the motion, Agee concedes that his activities are causing and likely to cause serious damage to the national security or foreign policy of the United States.

The right to travel is constitutionally protected. *Kent v. Dulles*, 357 U.S. 116 (1958); *Zemel v. Rusk*, 381 U.S. 1 (1965). Citizens seeking to travel abroad face significant legal and practical deterrents if denied valid passports.[4] The Secretary of State's power to revoke or limit a passport flows from Congress not from the President. *See Kent v. Dulles*, *supra*, 357 U.S. at 129; *Zemel v. Rusk*, *supra*, 381 U.S. at 7–13. *See also Lynd v. Rusk*, 389 F.2d 940, 944 (D.C. Cir. 1967). His power is no greater than Congress may choose to delegate to him. Although he is authorized to act pur-

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[4]As a legal matter, a citizen must hold a valid passport in order to enter or depart from the United States. 8 U.S.C. § 1185(b). As a practical matter, travel between foreign countries without a passport is at best difficult. *See generally* Zemel v. Rusk, 381 U.S. 1, 14 (1965); Lynd v. Rusk, 389 F.2d 940, 942 (D.C. Cir. 1967). In this instance, the State Department has offered to waive the general requirement of 8 U.S.C. § 1185(b) and allow plaintiff to re-enter the United States.

suant to 22 U.S.C. § 211a ("the Act"), this statute does not confer "unbridled discretion" to grant, revoke or otherwise restrict passports. Quite the contrary, the Supreme Court has instructed that when interpreting the nature and limits of the authority delegated over time by Congress such authority is to be narrowly construed. *Kent v. Dulles, supra,* 357 U.S. at 129. Close attention is particularly warranted where, as here, the Secretary promulgated a rule enabling him to take action against the passport of a single individual. *See Zemel v. Rusk, supra,* 381 U.S. at 13.

The Secretary can demonstrate that he has been given statutory authority in one of two ways. He must establish either that he acts pursuant to an explicit delegation or that he has followed "sufficiently substantial and consistent" administrative practice to warrant the implied approval of Congress. *Zemel v. Rusk, supra,* 381 U.S. at 12. He attempts here, unsuccessfully, to meet both tests.

When the Secretary issued the challenged regulation in 1968, he relied on the Act. It is undisputed that this code provision does not expressly authorize the Secretary to deny or revoke a passport on national security grounds. No subsequent legislation relating to passports has expressly delegated such authority. Indeed, in 1958 during the administration of President Eisenhower the Department sought this precise authority and it was not granted by the Congress.[5]

The issue, therefore, is whether or not implied approval can be established. The Secretary urges that a

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[5]*See* discussion at pp. 5–6 below.

long-standing historical practice involving passport denials based on national security and foreign policy interests exists, and that this historical practice, unquestioned by Congress, confirms the validity of the regulation. The Secretary adds that when Congress amended the Act in 1978[6] it assented *sub silentio* to the validity of the 1968 regulation.

Only on one prior occasion has a passport been revoked pursuant to 22 C.F.R. § 51.70(b)(4). This solitary invocation over a 12-year period does not approach the level of substantial and consistent administrative practice. Indeed, until now the regulation has been virtually unused.

Defendant's main evidence for recognized prior practice is a series of statutes, regulations, and advisory opinions dating back to 1861. Some of these materials assert executive authority to refuse passports to persons participating in criminal conduct. Others affirm the President's power to restrict or condition passport issuance in order to protect the interests of the nation during times of war of formally declared national emergency. *See, e.g.*, Pub. L. No. 65–154, 40 Stat. 559 (1918); Pub. L. No. 77–114, 55 Stat. 252 (1941). These powers were understood to be delegated

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[6]*See* Pub. L. No. 95–426, § 124, 92 Stat. 971 (1978). The only change made was the addition of a final sentence, providing as follows:

> Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is immiment danger to the public health or the physical safety of United States travellers.

to meet exigent circumstances for a listed purpose. *See, e.g.*, H.R. Rep. No. 485, 65th Cong., 2d Sess. 2 (1918). The congressional actions taken are not, however, persuasive on the issue of implicit authorization to invoke national security or foreign policy considerations in peacetime when no national emergency has been declared and no criminal conduct charged. While the Supreme Court in *Zemel* examined wartime as well as peacetime precedents, there was ample evidence of area travel restrictions being imposed under peacetime conditions. Comparable indications have not been produced regarding the imposition of passport controls to protect national security. Defendant's exclusive reliance on measures enacted or promulgated to address wartime or emergency conditions is inapposite.

At oral argument the Secretary pointed to State Department testimony during a series of congressional hearings covering passport legislation in 1957 and 1958. He argued that because the Department testified it already had the power it now asserts, and that legislation would serve as a mere clarification, Congress was effectively put on notice; its failure to reject this Executive interpretation is said to convey implicit approval.

This argument cannot withstand scrutiny. Expansive assertions made during the 1957 hearings must be read in light of *Kent v. Dulles*, which seriously limited the Secretary's power to deny passports in analogous circumstances under then-existing law. Immediately following the *Kent* decision, the Administration introduced a bill that would have given the Secretary the

precise authority sought here.[7] But Congress failed to enact what was sought, and indeed several Senators expressed opposition or concern over the national security and foreign affairs provisions of the Administration bill.[8] Implied authority is not gained in this fashion.

Nor do the 1978 amendments constitute congressional assent by inaction. Legislative silence cannot be read as implicit adoption of an obscure, virtually unused regulation that limits the free exercise of protected rights. *See Lynd v. Rusk*, *supra* at 946–47. This is particularly apparent where, as here, the action that Congress did take, *i.e.*, cutting back the Executive power over area travel restrictions conferred in *Zemel*, is hardly receptive to implying additional delegated authority. *See* H.R. Rep. No. 842, 95th Cong., 1st Sess. 14–15 (1978).

The Court is forced to conclude that the Secretary's promulgation of the challenged regulation was without authorization from Congress. It is unnecessary,

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[7]The Administration's bill, introduced as S.4110, authorized the Secretary to deny passports to persons whose presence abroad would "seriously impair the conduct of the foreign relations of the United States" or "be inimical to the security of the United States." S. 4110, Sec. 103(6). *See* 104 Cong. Rec. 13046 (July 7, 1958) (Message from the President); *Passport Legislation: Hearings on S.2770, S. 3998, S. 4110 and S. 4137 before the Senate Comm. on Foreign Relations*, 85th Cong., 2d Sess. 4 (1958).

[8]*See, e.g., Hearings, supra* note 7 at 29–31 (Sen. Fulbright), 38–39 (Sen. Sparkman), 49–50 (Sen. Humphrey). Although the failure to enact legislation does not justify an inference of congressional disapproval, inaction under these circumstances can hardly be viewed as tacit support for the broad discretion claimed.

therefore, to consider the additional attacks on the regulation based on the First and Fifth Amendments.

This holding in no way is intended to affect the President's authority to limit Agee's travel by other means. While it is obvious in the present crisis that the national security may be endangered when a former government official travels among foreign countries denouncing the United States' intelligence service and revealing the names of government agents, the precise problem presented is whether the regulation invoked was legally authorized. If Agee is indicted for any violation of law, his passport may be cancelled. If his activities are detrimental to the hostages in Iran, a special statute exists, 22 U.S.C. § 1732 (1976), which appears to give the President extraordinary authority to act. There may be other options. All that is held here is that because Congress has not acted to grant the Secretary authority, the regulation in issue cannot be upheld.

Plaintiff's motion for summary judgment is granted; defendant's cross-motion is denied. The regulation having been declared invalid, plaintiff's passport shall be restored.

SO ORDERED.

/s/ _____

GERHARD A. GESELL
United States District Judge

JANUARY 28, 1980.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

Civil Action No. 79–3491

UNITED STATES COURT OF APPEAL
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED JUN 27, 1980

GEORGE A. FISHER
Clerk

No. 80–1125

PHILIP AGEE

v.

EDMUND S. MUSKIE, SECRETARY OF STATE,
APPELLANT

Appeal from the United States District Court for the District of Columbia.

Before: MACKINNON, ROBB, and WALD, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ _____
GEORGE A. FISHER
Clerk

Date: June 27, 1980
Opinion for the Court filed by Circuit Judge Robb
Dissenting opinion filed by Circuit Judge MacKinnon

APPENDIX D

DECLARATION OF DAVID D. NEWSOM

David D. Newsom declares, under penalty of perjury, as follows:

1. I am the Under Secretary of State for Political Affairs. In that capacity I have had direct responsibility for keeping abreast of those political conditions in the various countries of the world which may have an impact upon the national security and foreign policy of the United States.

2. In recent months and particularly in recent weeks the citizens of various foreign countries, particularly Islamic countries, have demonstrated an increasing sensitivity to allegations that the Government of the United States has conducted and is conducting intelligence operations within their borders. Allegations and suspicions of such United States intelligence activities have contributed in some areas to an intensification of anti-American feelings which have the potential to cause serious damage to the national security and foreign policy of the United States. Examples of actual damage may be found in the recent attacks on the United States Embassies in Iran, Libya and Pakistan.

3. I am informed that Mr. Philip Agee has made a regular practice of making public allegations that specific U.S. employees in specific countries have been or are engaged in intelligence work. It is my understanding that he has named large numbers of individuals as being so engaged and that, without confirming or denying the truth of his statements, the mere alle-

gations themselves have endangered the lives and well-being of many United States employees.

4. I am also informed that Mr. Agee has traveled extensively abroad and that on a number of occasions, when he was visiting a specific country, he made public allegations as to the identity of specific United States employees who, according to Mr. Agee, were currently carrying out U.S. intelligence activities within the specific country, thus endangering such individuals. It has been reported in the press (*New York Post*, December 17, 1979) that Mr. Agee had been invited to travel to Iran in order to participate in a Tribunal involving the hostages in Tehran.

5. Given the recently demonstrated sensitivities described in Paragraph 2 above, it is clear to me that, if Mr. Agee continues to travel at will and in the course of such travel to make public allegations against United States officials in foreign countries, such activities are likely to cause serious damage to the national security and foreign policy of the United States. Among the adverse consequences which could result from such activities would be that United States diplomatic facilities, including embassies and consulates, would be taken over by force and that United States diplomats and other nationals would be physically harmed.

6. For the foregoing reasons I concur in the conclusion, as previously articulated by the Department of State, that Mr. Agee's activities have caused and are likely to cause serious damage to the national security and foreign policy of the United States.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief. Executed on December 31, 1979.

/s/_____

DAVID D. NEWSOM

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3491

PHILIP AGEE, PLAINTIFF,

v.

CYRUS VANCE, DEFENDANT.

AFFIDAVIT

John N. McMahon does depose and say as follows:

1. I am the Deputy Director for Operations of the Central Intelligence Agency (CIA) and I have held that position since January 11, 1978. I previously have held various executive positions since I entered on duty with the CIA on September 7, 1951. As Deputy Director for Operations, I am the head of the Directorate of Operations of the CIA, which is that component within the CIA which has as its major responsibility the conduct of clandestine operations utilizing human resources. The statements made herein are based upon my knowledge, upon information made available to me in my official capacity, and upon conclusions reached in accordance therewith.

2. Philip Burnett Franklin Agee entered on duty with the CIA on July 22, 1957 and resigned effective November 22, 1968. During the course of his employment, Mr. Agee worked in various positions of trust

within the Agency, specifically, the Directorate of Operations, then known as the Directorate of Plans.

3. Shortly after his entrance on duty, Mr. Agee received formal training in clandestine operations including, specifically, methodology employed to provide cover for CIA employees. Mr. Agee served overseas in undercover assignments in Latin America, in addition to holding various positions at CIA Headquarters. In the course of his employment, Mr. Agee became personally acquainted with numerous CIA employees under cover, many of whom are still active employees whose association with CIA has never been officially acknowledged. Also as a consequence of his work, Mr. Agee acquired detailed knowledge of the secret methodology used by the Agency to provide cover for its employees and cooperating sources.

4. All personnel employed by the CIA, prior to commencement of their official duties, as a condition of employment and a prerequisite to being allowed access to classified information, are required to sign a Secrecy Agreement. Philip Agee executed such an Agreement on July 22, 1957, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A".

5. The files of the Office of Security of CIA contain no record that Philip Agee made a request at any time to be released from the terms of this Secrecy Agreement.

6. During the entire period of his employment with the Agency, Mr. Agee's performance as an intelligence officer was considered competent. His resignation in November 1968 came about as a consequence of per-

sonal problems which threatened to expose his CIA affiliation in an undercover position.

7. In November 1971, CIA received the first indication that Mr. Agee had embarked on a program to expose CIA clandestine activities and personnel when a Uruguayan publication published a letter purportedly written by Mr. Agee in which CIA was accused of interference in Uruguayan elections then about to take place. On October 3, 1974, Mr. Agee issued a press release in London in which he said the following:

> Today, I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating; secondly, to seek within the United States to have the CIA abolished.
>
> This effort to identify CIA people in foreign countries has been going on for some time. . . . (Today's) list was compiled by a small group of Mexican comrades whom I trained to follow the comings and goings of CIA people before I left Mexico City.
>
> Similar lists of CIA people in other countries are already being compiled and will be announced when appropriate. We invite participation in this campaign from all those who strive for social justice and national dignity.

8. Since that time, Mr. Agee has engaged in a program designed to expose CIA activities and personnel, through publications, personal appearances and press

conferences throughout the world, in part as specified below:

—On October 3, 1974, in London (see Para. 7, above) Philip Agee disclosed the names of thirty-seven (37) persons whom he alleged to be CIA people under cover.

—On April 16, 1975, Philip Agee, at a press conference in London, distributed a document which contained the names of sixteen (16) persons alleged to be CIA officers posted in London.

—On August 1, 1975, Philip Agee, during an appearance on television, named four (4) persons as alleged CIA employees stationed in Lisbon.

—On October 21, 1975, Mr. Agee, in an interview on the Swedish radio, named seven (7) persons as alleged CIA employees stationed in Sweden.

—A *Reuters* news item, datelined London, December 4, 1975, noted that Mr. Agee had addressed a political rally at the London School of Economics. Mr. Agee claimed that earlier in the week he had sent the names of eighteen (18) CIA employees in Kinshasa to the Popular Movement for the Liberation of Angola (MPLA). Mr. Agee also said he had sent fifteen (15) additional names as possible CIA employees in Kinshasa.

—The January 12, 1976 issue of *Cambio-16*, a Madrid magazine, contained an expose of CIA in Madrid and listed the names of nine (9) alleged CIA officers. In a BBC broadcast three days before the magazine went on sale, Mr. Agee denied having helped with the expose. In the article,

however, he is credited with assisting the writers in their research.

—The Dutch newspaper *Vrij Nederland* published an expose of CIA in The Hague on January 21, 1976, naming eight (8) alleged CIA officers. The author acknowledged that he had coordinated his efforts with Mr. Agee.

—On June 5, 1976, Mr. Agee, in a speech in Copenhagen, recommended that interested persons band together and begin a program of photographing the U.S. Embassy Staff. He claimed to know the names of six (6) CIA officers stationed in Copenhagen.

—The July 25, 1976 issue of *L'Espresso* in Rome published an article on CIA in Switzerland naming twenty (20) persons as alleged CIA employees. The author gave Mr. Agee credit for his research and help in identifying CIA personnel in Switzerland.

—The 16th Edition of *Resistencia*, the publication of the Bolivian Committee of Antifascist Resistance, named eleven (11) individuals as alleged CIA officers in La Paz. This information was repeated on August 3, 1976 by *Agence France Press*. The information in the *Resistencia* article was attributed to Mr. Agee.

—Mr. Agee arrived in Kingston, Jamaica on September 9, 1976 on a speaking tour. He had several television and radio interviews and made several speeches. On September 16th, Mr. Agee held a press conference in Kingston and announced the

names of eleven (11) alleged CIA employees in Kingston.

—The Australian Broadcasting Company (ABC) broadcasted an interview with Mr. Agee on May 17, 1977, in which he named five (5) persons, claiming they were CIA employees in Australia.

—The Wellington, New Zealand *Sunday News*, of May 22, 1977, reported that Mr. Agee in London had identified two (2) persons alleging them to be CIA employees in New Zealand.

—In July 1978, Mr. Agee was interviewed on Cuban television in Havana. He stated that he had come to Havana at the invitation of the National Preparatory Committee for the World Youth Festival in order "to continue my work of recent years in connection with political education so that the people are able to learn about the methods, or exactly how to identify the CIA personnel in different countries." [Foreign Broadcast Information Service translation.].

9. In 1978, Mr. Agee, in contravention of his Secrecy Agreement, participated in the publication of *Dirty Work: CIA in Western Europe*. In the introduction to that book, Mr. Agee stated that he intended, by participating in the publication of *Dirty Work*, to create opposition to the CIA by publishing the identities of CIA employees. The book contains an appendix which purports to list a large number of persons to be undercover CIA employees. The book's introduction is incorporated herein by reference as Exhibit "B".

10. Recently, the CIA has received information that Lyle Stuart, Inc. intends to publish a book entitled *Dirty Work II: The CIA in Africa*. That book also purports to identify a large number of CIA undercover employees. An advertisement for that book states that the course of the material to be published in *Dirty Work II* is Mr. Agee in collaboration with one Louis Wolf. The advertisement states that in *Dirty Work II* "hundreds of agents are identified, together with their background, cover activities and actual missions."

11. Philip Agee has stated his intention to destroy the clandestine capabilities of CIA through exposure of the identities of undercover employees and agents on many occasions. He has indicated that the purpose of such exposure is to cause disruption of the activities of the CIA through expulsion or through thinly-veiled invitations to violence. He has further indicated his readiness to make identifications of CIA personnel through "personal knowledge." All these themes have been stated, among other places, in the attached article "Exposing the CIA," by Mr. Agee, reprinted in *Dirty Work: The CIA in Western Europe*. This article is incorporated herein by reference as Exhibit "C".

12. Although there have been numerous instances in which American officials have been subject to deliberate public exposure as alleged CIA officers, these exposures generally have been identified as propaganda originating with opposition intelligence services or political groups hostile to the United States. While such exposures may, in fact, have caused some measure of damage to the ability of those officials to perform their work, there is, in my judgment, an enor-

mous difference between an allegation of CIA connection by hostile foreign governments and foreign publications on one hand, and a similar allegation by a former CIA employee such as Mr. Agee on the other.

13. Mr. Agee, a former CIA employee who had access to sensitive intelligence information, is perceived abroad as a highly credible source. Thus, Mr. Agee's efforts to use this privileged information to expose undercover CIA employees and provoke action against them has disrupted the activities of the CIA. Given the current dangerous situation in which official American personnel find themselves in Iran and elsewhere, if he continues these efforts it will certainly place the lives and safety of American officials in jeopardy.

On this 29th day of January 1980, I declare under penalty of perjury that based upon information made available to me in my official capacity and to the best of my knowledge and belief, the statements made herein are true and correct.

/s/ _____

JOHN N. MCMAHON
Deputy Director for Operations
Central Intelligence Agency
Washington, D.C. 20505

Attachments

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 80-1125

PHILIP AGEE, PLAINTIFF-APPELLEE,

v.

CYRUS VANCE, DEFENDANT-APPELLANT.

**AFFIDAVIT IN SUPPORT
OF MOTION FOR STAY PENDING APPEAL**

John N.McMahon does depose and say as follows:

1. I am the Deputy Director for Operations of the Central Intelligence Agency (CIA). My duties and responsibilities remain as set forth in my affidavit of 30 January 1980, filed in the District Court in this action, which is incorporated by reference and made a part hereof.

2. Mr. Agee has stipulated that his "activities are causing and likely to cause serious damage to the national security or foreign policy of the United States." The purpose of this affidavit is to acquaint the Court with the ways in which his continued ability to travel abroad in the pursuit of his publicly-stated objectives increases the danger to American officials abroad and to the national security.

3. Philip Burnett Franklin Agee entered on duty with the CIA on 22 July 1957 and resigned effective 22

November 1968. During the course of his employment, Mr. Agee worked in various positions of trust within the Agency, specifically, the Directorate of Operations, then known as the Directorate of Plans.

4. Shortly after his entrance on duty, Mr. Agee received formal training in clandestine operations including, specifically, methodology employed to provide cover for CIA employees. Mr. Agee served overseas in undercover assignments in Latin America, in addition to holding various positions at CIA Headquarters. In the course of his employment, Mr. Agee became personally acquainted with numerous CIA employees under cover, many of whom are still active employees whose association with CIA has never been officially acknowledged. Also as a consequence of his work, Mr. Agee acquired detailed knowledge of the secret methodology used by the Agency to provide cover for its employees and cooperating sources.

5. As explained in my affidavit of 30 January 1980, Mr. Agee has embarked on a program to expose CIA clandestine activities and personnel. For the reasons described below, his ability to travel markedly enhances the effectiveness of his activities.

6. There are several techniques that have been published alleging to explain how CIA officers can be identified and uncovered. In my judgment, the published techniques are not sufficient by themselves to make meaningful identifications of CIA officers and intelligence sources. Agee himself establishes in his exposures that such information is insufficient. Agee, for example, refers continually to "Embassy sources" and "diplomatic and consular lists"—some of which are

only available in local diplomatic circles. Agee's list of alleged CIA officers in Part 2 of the Appendix in *Dirty Work: The CIA in Europe* makes frequent references to these kinds of sources which would be available only on the local scene in the country on which he has focused. Sources, human or documentary, cannot be consulted, interviewed or debriefed without visiting the country in which they are found.

7. It is clear that Agee cannot personally conduct all the investigative efforts which are an essential element of his program to expose undercover CIA people. As Agee himself has acknowledged, he employs agents and collaborators to assist him in these efforts. To assure the effectiveness of his collaborators he must train them in the clandestine techniques needed to expose and compromise the cover of CIA employees abroad. Agee's ability to travel thus enables him to find, recruit and train his collaborators. For example, Agee said in October 1974 (*cf.* para. 7 of my 30 January 1980 affidavit) "[today's] list was compiled by a small group of Mexican comrades whom I trained to follow the comings and goings of CIA people before I left Mexico City." In July 1978 (*cf.* p. 6 of my 30 January 1980 affidavit) Agee, in an interview on Cuban television in Havana, said that he came to Cuba "to continue my work of recent years in connection with political education so that people are able to learn about the methods, or exactly how to identify the CIA personnel in different countries." Without the ability to travel Agee will be severely handicapped in locating, recruiting, training and receiving reports from foreign nationals who, for whatever reason, may be willing to support him and his program.

8. The ultimate effectiveness of Agee's program, to destroy the CIA's operations abroad, is dependent on the activities of hostile foreign groups. Such groups, depending on the degree of their political extremism, will engage in actions designed to harm the CIA; such as physically surveilling U.S. officials abroad; harassing them by other means, such as demonstrating and picketing their homes and offices and, in extreme cases, committing murder. (I do not intend here to claim that Agee has specifically incited anyone to commit murder. It is my judgment, nevertheless, that Agee's actions could, in today's circumstances, result in someone's death. In an article by Philip Agee, "Exposing the CIA," [attached hereto as Exhibit A] Agee says that, by exposing undercover CIA people, pressure can be brought to cause foreign governments to expel the CIA people and "in the absence of such expulsions, which will not be uncommon, the people themselves will have to decide what they must do to rid themselves of the CIA.") In order to incite hostile groups to action Agee has, during the past several years, made personal appearances before hostile groups in his travels abroad. Similarly, press conferences, press releases, and appearances on radio and TV have significant impact only when they take place within the country in which Agee seeks to incite anti-CIA action.

9. An example of a specific threat to the national security that could result from Agee's ability to travel freely is found in recent events reported in the press. An article in the *New York Post* on 17 December 1979 indicated that Agee would be invited to visit Iran to

participate in a "Revolutionary Tribunal" to pass judgment on the hostages held in the American Embassy in Tehran. On 23 December 1979 the American Consulate in Hamburg, Germany, notified Agee that his passport had been revoked. It was not until after Agee had been advised that his passport had been revoked that he stated publicly that he had not intended to visit Iran until the hostages were released. At that time Agee announced that he had suggested to the Iranian terrorists that they should release the hostages in exchange for all CIA records on CIA intelligence operations in Iran for the past 25 years. In that connection Agee offered to assist the terrorists in analyzing such documents. According to newspaper accounts the terrorists rejected Agee's offer. Nevertheless, Agee, since that time, is reported to have specifically suggested to the terrorists that he would travel to Iran after the hostages were released. Since it is known that the terrorists obtained Embassy documents when they ransacked the Embassy, Agee's travel to Iran even in the eventuality that the hostages are released, would enable him to do an on-the-spot analysis of the possibly classified documents the terrorists currently possess. Newspaper articles referred to in this paragraph are attached hereto as Exhibit B.

10. Recent events, particularly the hostage situation in Tehran as well as the attacks on our Embassies in Islamabad and Tripoli, demonstrate clearly that the political instability and the anti-American feelings in certain countries have increased to the point of making open violence probable with little provocation. Agee's program of exposing American's abroad by accusations

of their involvement with CIA has markedly increased the likelihood of individuals so identified being the victims of violence. Agee's lists of people alleged to be CIA officers now constitute convenient "hit lists" for terrorists groups and radical political organizations anxious to find a means of gaining instant notoriety and national political prominence. For the reasons stated herein, Agee's continued ability to travel will clearly increase the likelihood and probable extent of serious damage to our Nation's foreign affairs and greatly increase the threat to the safety and lives of American officials abroad.

On this 1st day of February 1980, I declare under penalty of perjury that based upon information made available to me in my official capacity and to the best of my knowledge and belief, the statements made herein are true and correct.

/s/ _____

JOHN N. MCMAHON
Deputy Director for Operations
Central Intelligence Agency
Washington, D.C. 20505

APPENDIX G

DEPARTMENT OF STATE
Washington, D.C. 20520

January 14, 1980

TO WHOM IT MAY CONCERN:

I, Frank M. Machak, Chief, Document and Reference Division, Foreign Affairs Document and Reference Center, am the custodian of the documents and communications of the Department of State. I hereby certify that the document hereunto annexed reproduces accurately the text of the letter which was cabled to the United States Consulate in Hamburg for delivery to Philip Agee to effect revocation of his passport. The Department of State has not yet, to the best of my knowledge, received a copy of the letter as it was delivered to Mr. Agee.

/s/ _____
FRANK M. MACHAK
Chief
Document and Reference Division
Foreign Affairs Document
and Reference Center

The Department of State has requested the Consulate to inform you that the Department has revoked Passport No. Z3007741 issued to you on March 30, 1978 under the provisions of Section 51.71(a) of Title 22, Code of Federal Regulations.

The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

You are advised of your right to a hearing under Sections 51.80 through 51.105 of the Regulations. A copy of the regulations is enclosed. If you should desire a hearing, you must notify the Consulate within sixty days after your receipt of this notice.

You are requested to surrender the passport to the Consulate forthwith. In this connection, please note Sections 51.9 and 51.76 of the passport regulations pertaining to the surrender of passport on demand.

Any future use of the passport could constitute a violation of Section 1544 of Title 18, United States Code.

You are also advised that the Consulate is prepared to receive, on an expedited basis, any evidence you may wish to present on your behalf as to why your passport should be re-instated. This opportunity to present evidence is in addition to your right to a hearing pursuant to the Regulations and is designed to afford you the fullest possible due process.

DEPARTMENT OF STATE
Washington, D.C. 20520

January 14, 1980

TO WHOM IT MAY CONCERN:

I, Frank M. Machak, Chief, Document and Reference Division, Foreign Affairs Document and Reference Center, am the custodian of the documents and communications of the Department of State and hereby certify that the document hereunto annexed is a true copy of the original.

/s/ _____
FRANK M. MACHAK
Chief
Document and Reference Division
Foreign Affairs Document and
Reference Center

DEPARTMENT OF STATE
Assistant Secretary for Consular Affairs
Washington

December 28, 1979

Mr. Melvin L. Wulf
Clark, Wulf, Levine, and Peratis
113 University Place
New York, New York 10003

Dear Mr. Wulf:

I have been advised by the Legal Adviser of the Department of State that you have requested a meeting with a senior official of the Department in order to make known the position of your client, Mr. Philip Agee, with respect to the recent revocation of his passport. I understand that you originally requested a meeting with the Secretary of State and that the Legal Adviser has informed you as to why such a meeting would appear to be inappropriate. Alternatively, you have requested a meeting with me, and such a meeting has been scheduled for this morning. In proceeding with the meeting you should understand that it does not supplant the administrative procedures required by 22 C.F.R. § 51.81 *et seq.*, which prescribe the means for contesting a passport revocation.

You should also be advised of the willingness of the Department of State to grant Mr. Agee an immediate administrative hearing as provided in the above-cited regulation. Under 22 C.F.R. § 51.82 Mr. Agee is entitled to five days' advance notice, and the Department

is prepared to hold such a hearing five days from now if Mr. Agee so desires. Moreover, if Mr. Agee wishes to waive his right to five days' notice, the Department would be willing to hold the hearing as early as Monday, December 31. A hearing officer and stenographer will be available on that date or on any subsequent date selected by you and Mr. Agee. The Department is also prepared to have the hearing take place in Hamburg, West Germany, if that is your preference.

Sincerely,

/s/_____

Barbara M. Watson

APPENDIX H

Affidavit of Loren Lawrence

I, Loren Lawrence, being duly sworn, depose and say as follows:

1. I am the United States Ambassador to Jamaica. In that capacity I am responsible for relations between the United States and Jamaica and for keeping abreast of political and other developments in Jamaica. I make this affidavit on the basis of my personal knowledge and of information reported to me by the staff of the U.S. Embassy in Kingston.

2. On July 2 one Louis Wolf, who I understand to be in collaboration with Philip Agee in activities aimed at the disclosure of identities of U.S. intelligence agents, held a press conference in Kingston which was covered by both radio and television and publicized widely in the media in Jamaica. I personally viewed the televised braodcast of the conference.

3. During the conference Wolf alleged that there are fifteen agents of the Central Intelligence Agency working in Kingston. He charged that the CIA operation in Kingston is at an all-time high for Jamaica and is one of the biggest in Latin America, ranking in size with the CIA operations in Chile and Brazil.

4. Wolf named as Central Intelligence Agency employees the following individuals: State Department employees Richard Kinsman, William Moffett, Patricia Dolan, Florine Cox, Thomas Ballweg, Sunda Kingsley, Wesley Kingsley, Albert Nevils and William Baque; Agency for International Development officers William

Goodson and Jesse Jones; and Foreign Service national employees Ruby Johnson and Claudette Browne. Also named were State Department employees Dean Almy and Bruce Pearson, who are no longer at post; State Department employee Travis Poston, who was reassigned without arriving at post; and AID officer Edward Baker, who has departed post. Wolf further alleged that the persons named were responsible for the following CIA functions: Kinsman was the chief of station; Moffett was the deputy chief of station; Pearson was the former deputy chief of station, and the other named individuals included five operations officers, one telecommunications officer assigned but not yet at post, five secretaries and records keepers, and one Foreign Service Officer who performs joint activities with the CIA.

5. Following Wolf's press conference the local media published a list of the persons he had named, together with their residential addresses. Subsequently pamphlets were circulating in certain areas of Kingston carrying the names, dates of birth, diplomatic titles, alleged CIA titles, previous assignments, local addresses and telephone numbers, and the type of car driven by the persons named by Wolf, as well as the picture of one of the persons named.

6. On July 4 at approximately 2:30 A.M. the residence of Richard Kinsman, Embassy political officer named by Wolf, was strafed with automatic gunfire. Several impact marks were later found on the front wall of the residence. Two bullets went through the window of a child's bedroom. A small crater was found on the lawn near the same wall. Mr. Kinsman was

alone at home at the time, his family being on vacation on the North Coast of Jamaica. No one was injured in the attack.

7. I am informed that at approximately midnight on July 8, 1980, three men dressed as women approached the home of Jesse Jones, one of the employees of the Agency for International Development who had been named by Wolf. When the police and guards outside the home challenged them, the three fled. The police fired on the men, who returned the fire with handguns. The police and guards gave chase for a short distance, but were unable to apprehend the three.

8. Because of the danger to the safety of the persons named by Wolf, I have taken steps to provide extra security protection to them. Several of the named persons have been withdrawn from Jamaica in the last few days out of concern for their personal safety. The perpetrators of the attack on the Kinsman residence and the three men who approached the Jones residence have not been identified and are still at large.

/s/ _____
LOREN LAWRENCE

Subscribed and sworn to before me this 10th day of July 1980 at Washington, D.C.

My Commission Expires June 15, 1984

/s/ _____
IRENE INGALLS

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 323792 26

No. 80-83

In the Supreme Court of the United States

OCTOBER TERM, 1980

EDMUND S. MUSKIE, SECRETARY OF STATE, PETITIONER

v.

PHILIP AGEE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PETITION FOR A WRIT OF CERTIORARI FILED
JULY 18, 1980
CERTIORARI GRANTED OCTOBER 6, 1980

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GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

80-1125

APPEAL FROM THE DISTRICT COURT

PHILIP AGEE

v.

EDMUND MUSKIE, SECRETARY OF STATE, APPELLANT

DATE	FILINGS—PROCEEDINGS
1-29-80	Copy of notice of appeal and docket entries from District Court (n-4)
1-29-80	Certified Original Preliminary Record
1-30-80	Certified Original Record (1 vol.); 2 vols. of transcripts under separate cover (n-4)
2-1-80	4-Appellant's motion for an emergency injunction (m-1)
2-1-80	4-Appellee's opposition to appellant's motion for emergency injunction (m-1)
2-4-80	Per Curiam order that the District Court's order is stayed until 5 p.m., Tuesday, February 5, 1980 to permit appellee to ldoge his affidavit, subject to further order of this Court; CJ Wright, SCJ Bazelon and Wilkey, CJ (who did not participate)
2-5-80	4-Appellant's reply to appellee's memorandum and affidavit opposing the motion for a stay pending appeal (m-5)
2-5-80	4-Appellee's affidavit (m-4) (lodged per 2/4/80 order)

2-5-80	Per Curiam order granting appellant's motion for stay and the parties shall file their briefs as follows: Feb. 15th—appellant's brief, 14 days thereafter—appellee's brief and 7 days thereafter—appellant's reply brief. No extension to this schedule will be granted, and the clerk is directed to schedule this case for argument between March 13, and April 16, 1980; CJ Wright, SCJ Bazelon and Wilkey, CJ (who did not participate)
2-19-80	4-Appellant's motion for leave to file typewritten brief without appendix (m-15)
2-19-80	10-Appendix (m-15)
2-20-80	4-Letter from counsel for appellant of additional authorities pursuant to Rule 28(j), FRAP (m-20)
2-26-80	Clerk's order granting appellants motion for leave to file brief without index
2-26-80	7-Appellant's brief (m-15)
2-26-80	15-Appellant's brief (m-19)
3-3-80	15-Appellee's brief (p-29)
3-4-80	Clerk's order, sua sponte, that the following times are allotted for oral argument: appellant—30 minutes and appellee—30 minutes
3-7-80	15-Appellant's reply brief (m-7)
3-14-80	Argued before MacKinnon,* Robb and Wald, CJ's
6-4-80	Letter dated 6-4-80 from clerk to cousnel for appellant requesting certain materials (See Letter).
	*SEE ENTRYS BELOW
6-27-80	4-Appellant's motion for stay of the District Court's order restoring appellee's passport and this Court's mandate pend-

	ing application to the Supreme Court for a writ of certiorari (p–27)
6-27-80	Per Curiam order that the order of the District Court is stayed for a period of 5 days from this date to afford this Court an opportunity to consider any representations which appellee may submit; MacKinnon, Robb & Wald, CJs
6-27-80	Opinion for the Court filed by Circuit Judge Robb
6-27-80	Dissenting opinion filed by Circuit Judge MacKinnon
6-27-80	judgment affirming in part and vacating in part the judgment of the District Court, in accordance with the opinion of this Court filed herein this date
6-27-80	Per Curiam order that the order of this Court filed herein on February 5, 1980, insofar as it granted appellant's motion for stay, is vacated, for the reasons set forth in the opinion for the Court filed herein this date; MacKinnon, Robb and Wald, Circuit Judges; Circuit Judge MacKinnon dissents for the reasons set forth in his dissenting opinion filed herein this date
6-27-80	4-Appellee's opposition to appellant's motion for stay (p–27)
(T)7-2-80	4-Appellant's motion to extend temporary stay of District Court's passport restoration order (p–2)
(T)7-2-80	4-Appellee's opposition to appellant's motion to extend temporary stay (p–2)
(C)7-2-80	Per Curiam order that the temporary stay entered 6/27/80 is extended to 7/18/80 to permit the filing of a petition for certiorari by the appellant is he is so advised; MacKinnon, Robb & Wald, CJs
(C)7-2-80	Copy of above order to District Court

(D)7-14-80	4-Appellant's motion for a stay pending review on certiorari (m-14)
(B)07-16-80	Per Curiam order denying appellant's motion for a stay pending review on certiorari and that the stay entered on 6-27-80 is extended to 7-23-80, to afford appellant a opportunity to apply to the Supreme Court for relief; MacKinnon, Robb and Wald, CJs (Judge Wald did not participate, but have previously indicated that she would deny any stay extending beyond that granted on July 2, 1980.)
(B)07-24-80	Per Curiam order, sua sponte, that the Clerk is directed not to issue the mandate this case until disposition by the Supreme Court of all matters relating to this case now pending before that court; MacKinnon, Robb and Wald, CJ's
(D)7-24-80	1-Appellee's bill of costs (m-21)
(T)7-28-80	Certified copy of order from Clerk, Supreme Court dated July 23, 1980 in SC No. A-73 (80-83) that the order of the United States District Court for the District of Columbia (No. 79-3491) dated January 28, 1980, requiring that respondent's passport be restored is stayed under further order of the Court
(H)8-5-80	Per Curiam order amending opinion of 6/27/80
(T)10-14-80	Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari filed in SC No. 80-83 on October 6, 1980; the motion of respondent (Agee) to vacate the stay heretofore entered by the Chief Justice is denied

DATE	NR.	PROCEEDINGS
1979		
Dec	31	COMPLAINT.

Dec	31	SUMMONS (3) & copies (3) of complaint issued. U.S. Atty. ser 1-2-80. Atty. Gen 1-3-80.
Dec	31	MOTION of pltf for a TRO; P&A; certificate pursuant to Local Rule 1-12; affidavit Melvin L. Wulf; attachment.
Dec	31	MOTION of pltf for TRO, heard & denied; set for hearing 1-2-80 or at such time Judge Gesell desires. (Rep: E. Olsen) PARKER, J.
Dec	31	ORDER denying motion of pltf for TRO; & directing parties to appear before the Judge assigned to this case for further proceedings on 1-2-80 or as soon thereafter as the Court's schedule permits. (N) PARKER, J.
1980		
Jan	03	PLTF to file motion for summary judgment by 1-9-80; Govt to respond by 1-14-80; arguments set for 1-18-80, 9:30 AM. (Rep: Watson) GESELL, J.
Jan	09	APPEARANCE of Allan Adler as co-counsel for pltf. CD/N
Jan	09	MOTION of pltf for summary judgment; statement of material facts; P&A.
Jan	14	CROSS-motion of deft for summary judgment; statement of genuine issues; P&A; exhibits A-C.
Jan	18	REPLY memo of pltf in support of motion for summary judgment; statement of genuine issues.
Jan	18	CROSS-motions for summary judgment argued & taken under advisement. (Rep: Weber) GESELL, J.
Jan	21	WITHDRAWAL of appearance of David E. Landau as atty for pltf. CD/N
Jan	29	MEMORANDUM & ORDER filed 1-28-80 granting motion of pltf for summary

		judgment; denying motion of deft for summary judgment; directing that the pltf's passport be restored. (N) 1 GESELL, J.
Jan	29	NOTICE of appeal by deft from memo & order entered 1-28-80. Copies mailed to Mr. Adler & Mr. Wulf. Govt.—no fee. 2
Jan	29	COPIES of notice of appeal & docket entries transmitted to USCA.
Jan	29	PRELIMINARY record on appeal delivered to USCA.
Jan	29	MOTION of deft for stay pending appeal; P&A; affidavit of John N. McMahon; exhibits A-C.
1979		
Dec	31	COMPLAINT. 3
Dec	31	SUMMONS (3) & copies (3) of complaint issued. U.S. Atty. ser 1-2-80. Atty. Gen. ser 1-3-80. 4
Dec	31	MOTION of pltf for a TRO; P&A; certificate pursuant to Local Rule 1-12; affidavit Melvin L. Wulf; attachment. 5
Dec	31	MOTION of pltf for TRO, heard & denied; set for hearing 1-2-80 or at such time as Judge Gesell desires. (Rep: E. Olsen) PARKER, J.
Dec	31	ORDER denying motion of pltf for TRO; & directing parties to appear before the Judge assigned to this case for further proceedings on 1-2-80 or as soon thereafter as the Court's schedule permits. (N) 6 PARKER, J.
1980		
Jan	03	PLTF to file motion for summary judgment by 1-9-80; Govt to respond by 1-14-80; arguments set for 1-18-80, 9:30 AM. (Rep: Watson) GESELL, J.

Jan	09	APPEARANCE of Allan Adler as co-counsel for pltf. CD/N 7
Jan	09	MOTION of pltf for summary judgment; statement of material facts; P&A. 8
Jan	14	CROSS-motion of deft for summary judgment; statement of genuine issues; P&A; exhibits A-C.
Jan	18	REPLY memo of pltf in support of motion for summary judgment; statement of genuine issues. 10
Jan	18	CROSS-motions for summary judgment argued & taken under advisement. (Rep: Weber) GESELL, J.
Jan	21	WITHDRAWAL of appearance of David E. Landau as atty for pltf. CD/N 11
Jan	29	MEMORANDUM & ORDER filed 1-28-80 granting motion of pltf for summary judgment; denying motion of deft for summary judgment; directing that the pltf's passport be restored. (N)GESELL, J.
Jan	29	NOTICE of appeal by deft from memo & order entered 1-28-80. Copies mailed to Mr. Adler & Mr. Wulf. Govt.—no fee.
Jan	29	COPIES of notice of appeal & docket entries transmitted to USCA.
Jan	29	PRELIMINARY record on appeal delivered to USCA.
Jan	29	MOTION of deft for stay pending appeal; P&A; affidavit of John N. McMahon; exhibits A-C.
1980		
Jan	29	MOTION of deft to stay pending appeal granted until 2-4-80 to allow deft to see expedited stay before USCA. (N) GESELL, J.

Jan	29	ORDER granting motion of deft for stay pending appeal to the extent that this Court's order dated 1-28-80 is stayed until close of business on 2-4-80. (N) 13 GESELL, J.
Jan	30	TRANSCRIPT of proceedings for 1-3-80; pp. 1-18; Rep: I. Watson. (Court Copy) 14
Jan	30	TRANSCRIPT of proceedings for 1-29-80; pp. 1-15; Rep: I. Watson. (Court Copy) 15

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3491

PHILIP AGEE, PLAINTIFF

v.

CYRUS VANCE, ET AL., DEFENDANTS

Washington, D.C.
January 3, 1980

The above-entitled cause came on for Hearing before THE HONORABLE GERHARD A. GESELL, United States District Judge, at 9:00 a.m.

APPEARANCES:

MELVIN L. WULF, Esq.,
Of: CLARK, WULF, LEVINE & PERATIS,
New York, New York,
Counsel for Plaintiff

GLEN V. WHITAKER, Esq.,
Department of Justice,
JEFFREY SMITH, Esq.,
Department of State,
Counsel for Defendants

IDA Z. WATSON
Official Reporter
U.S. Court House
Washington, D.C.

COPY FOR:
MR. WHITAKER

[2] **PROCEEDINGS**

THE CLERK: Civil Action No. 79-3491, Agee v. Vance. Mr. Melvin L. Wulf for the Plaintiff. Mr. Glen Whitaker and Mr. Jeffrey Smith for the Defendants.

THE COURT: I understood, Mr. Wulf, that you suggested in a call to chambers that we have this meeting to set up future scheduling in this matter.

MR. WULF: That was my understanding, Your Honor, yes.

If I may propose a schedule to Your Honor. I see this as an urgent case, that as long as the passport stands revoked, Agee's rights to travel continue to be cumulatively impaired.

I would like to urge very strongly the earliest possible disposition on the preliminary and permanent injunction. There aren't any factual disputes in the case, purely a paper case, issues of law.

We are attacking the authority of the Secretary of State to do this on its face.

We have prepared a memorandum in support of our TRO and preliminary injunction which we would like a few days to refine because we did that very quickly.

I would suggest that we could get that in by the middle of next week; give the Government a few days. They have had our memorandum of law since Monday anyhow. We are [3] not going to add any new issues. As I say, we are merely going to refine it. I should think they would be able to get their answering memorandum in in a few days; and then if you should want oral argument, that we do that the following week.

That is my proposal under what I see as the urgent circumstances of the case.

THE COURT: In other words, you are prepared to concede that your client is causing or is likely to cause serious damage to the national security and you want to just test the regulations?

MR. WULF: Yes. I believe that the Secretary of State, based on clear Supreme Court doctrine in Kent v. Dulles and Zemel v. Rusk, doesn't have any authority to impose these regulations.

That is what I want to argue. I am confident that that will be the result. Forgive me for anticipating the decision.

THE COURT: And, therefore, the factual issues of whether Agee was causing or likely to cause serious damage to the national security would be conceded.

MR. WULF: I would—in fact, I wouldn't concede it in law. I would concede it for purposes of the preliminary injunction, yes.

THE COURT: You concede it for purposes of the [4] determination of the validity of the regulation.

MR. WULF: Yes, I think even under those circumstances the Secretary of State cannot on his own discretion revoke a passport.

Yes, I think that is clear from the cases.

THE COURT: I understand that legal position but I wanted to be sure when you said there were no facts in dispute that my approach would be in terms of an assumption, underlying factual assumption.

MR. WULF: I would concede that, Your Honor.

THE COURT: Otherwise, I think there are factual issues probably that have to be ventilated.

Then you would, in effect, move for summary judgment.

MR. WULF: If you care to see it that way.

THE COURT: I am just wondering. Wouldn't that be the way to do it? File a motion for summary judgment based purely on legal attack on the regulation and then have the response come in promptly and we would hear it.

MR. WULF: Theoretically, I can't file that until twenty days after filing the action.

THE COURT: No, but I would give you permission.

MR. WULF: I would be perfectly happy to do it as a summary judgment. I think procedurally it comes to the same thing.

[5] THE COURT: I think it does. I just wondered how we would classify it.

MR. WULF: I referred myself to the steel seizure cases which in fact came up on a preliminary injunction and was disposed of that way very quickly. I would be happy to do it in a way which—

THE COURT: We can do it that way, too. It makes no difference to me.

MR. WULF: I will be happy to file a motion for summary judgment.

THE COURT: Let's see what the Government's position is with respect to that and then we will work out a time schedule.

As far as I am concerned, while I am on trial continuously from now until May, we will break into the trials and dispose of this on a prompt schedule.

MR. WULF: All right. I appreciate that, Your Honor.

MR. WHITAKER: Good morning, Your Honor.

THE COURT: Good morning.

MR. WHITAKER: May it please the Court, my name is Glen Whitaker and I represent the Defendants in this case, with the Department of Justice.

Your Honor, we also wish to see this case resolved expeditiously. However, we believe that Mr. Agee should be [6] required to pursue the administrative remedies which are available to him under the regulations and which the Department of State has already expressed to him the desire to go forward expeditiously with that administrative process.

THE COURT: As I understand it, he has waived that.

MR. WHITAKER: Your Honor—

THE COURT: As I understand from the papers, he has waived that.

MR. WHITAKER: I understand he doesn't wish to pursue the administrative remedies but I think that it would be more useful for the Court and in the interest of judicial economy for him to be required to pursue the administrative remedies.

THE COURT: Why? What would it have to do with the validity of the State Department regulation?

MR. WHITAKER: I think there is some case authority for the proposition that he could raise that issue in the administrative process. He could press his claims, all of his

claims that he has raised here through the administrative process.

I am informed that there are new regulations which just went into effect in early November which allow for an appeal by Mr. Agee, after the initial hearing process before the hearing officer, up to the Board of Appellate Review. If he is successful anywhere along the line there, then that [7] is the end of the case. The matter cannot then be appealed by the State Department after there has been a decision by the Board of Appellate Review. It would not be appealed to the Secretary.

So if Mr. Agee succeeds anywhere along the line, if he presents evidence to establish that he is not likely to pose some damages—

THE COURT: No, he concedes it. He says he is a danger to national security and he says you are proceeding illegally, that you got a regulation that doesn't meet the requirements of Zemel. It is perfectly within your authority to have a Zemel regulation but for some reason you have decided you are not going to do it.

I must say the Court doesn't understand why. You want to just go after this man. They say you can't do that under the regulation.

That is the issue. Why isn't that a perfectly clear legal issue, particularly when the Court is aware that you have Government authority from the Supreme Court to meet what apparently is your primary concern about this man and you have not chosen to follow it.

You have not chosen to follow the Zemel approach and you haven't, for example, invoked some of your statutory authority such as 22 U.S.C. 1732.

You want to go this way. They say: Well, if you [8] want to go this way, they want to test the validity of your regulation.

I don't see anything wrong with that.

MR. WHITAKER: Your Honor, I don't see anything wrong with it but I think that that issue could be raised in the administrative process and if he were successful

through that administrative process, then there would be no need for Your Honor to render a decision on the matter.

THE COURT: I don't mind rendering decisions. That is my job.

In the meantime, this man is in limbo, isn't he?

MR. WHITAKER: Well—

THE COURT: Has he surrendered his passport?

MR. WHITAKER: Not that I am aware of.

THE COURT: Well, why hasn't he? He was told to.

MR. WHITAKER: Your Honor, I don't—

THE COURT: Can't you arrest him?

MR. WHITAKER: Your Honor, I don't believe so, not in Germany, no.

THE COURT: That surprises me. You mean you can't make him surrender his passport under international law when he has been directed to do so?

The Germans ought to ship him back here, then, if he won't surrender his passport.

MR. WHITAKER: Your Honor, we have been informed [9] that there are no present plans by the German Government to deport Mr. Agee.

THE COURT: In other words, Germany is going to allow him to have sanctuary there as a stateless person?

MR. WHITAKER: Your Honor, I don't know what their plans are. As far as him being a stateless person, he is free to return to the United States at any time.

THE COURT: How?

MR. WHITAKER: The State Department is prepared to issue him whatever identity card is necessary to return to the United States.

THE COURT: I can understand that.

MR. WHITAKER: With respect to the administrative process, if Your Honor believes that the administrative process is not appropriate in this instance—

THE COURT: I don't see how it contributes anything to the legal issue, the initial legal issue of the validity of the regulations.

If Plaintiff does not prevail on this, then we have a series of factual issues and I suppose then the question is whether they should be ventilated by administrative hearing or they should be ventilated in this case by deposition and a factual inquiry. But that is the second stage.

MR. WHITAKER: Well, Your Honor, we feel that if there is going to be any question about whether or not the [10] regulation was properly applied to Mr. Agee, whether his activities fell within the coverage of the—

THE COURT: They concede that his activities do.

MR. WHITAKER: Assuming that we can stipulate in our motions for summary judgment that his activities clearly fall within coverage of the regulation and that his activities do pose damage to the national security, then I agree with Your Honor, we can go forward on the legal issue.

THE COURT: As I understand the position, they are prepared to concede they are causing or likely to cause serious damage to the national security, which is the language of 51.70(b)(4).

MR. WHITAKER: Yes, Your Honor.

THE COURT: Now, Mr. Wulf, when would you file?

MR. WULF: I could file by Wednesday, Your Honor, of next week.

THE COURT: Wednesday. That would be in the form of a motion for summary judgment.

MR. WULF: Yes, Your Honor.

THE COURT: How much time would you like to respond to that?

MR. WHITAKER: Assuming that there is not a great deal more from Mr. Wulf, I believe, Monday, Your Honor.

THE COURT: So that would be Monday—

THE CLERK: January 14.

[11] THE COURT: —January 14.

Now I will want to hear argument and I think we ought to set an argument. I am on trial that whole week, am I not?

THE CLERK: Yes.

THE COURT: Could we set argument for nine-thirty on Friday, the 18th?

MR. WHITAKER: Yes, Your Honor.

MR. WULF: Yes.

THE COURT: I have got a jury trial and the easiest thing for me to do is just excuse the jury for Friday and give the lawyers a long weekend, Mr. Wulf, and turn to your matter at nine-thirty on the 18th.

MR. WULF: That date is fine with me, Your Honor.

THE COURT: All right, fine.

MR. WULF: May I just say one thing on the question of concession of the facts.

We are also going to attack the regulation on its face for being over-broad. Our concession is limited by that legal attack also.

THE COURT: Yes, but he would fall within the core of the objective of the regulation. Your client, you would be conceding, falls within the core of the objective of the regulation and the fact that it may be over-broad as to somebody else isn't very persuasive to me.

[12] The question is whether it is over-broad as to him and it can't be over-broad if he is causing serious damage to national security. The question is the validity of the regulation.

MR. WULF: Of course, what they explicitly say in their letter to him is, he is causing it or is likely to cause.

THE COURT: I know but if you concede that he is causing or likely to cause, you concede both. That is what I understood we were talking about.

MR. WULF: I will give that more thought but I still feel that I am going to argue that the regulation is over-broad; and we will try to figure out what the core meaning might be in our analysis of the over-breadth issue.

THE COURT: I am interested in making sure of the concession, Mr. Wulf. That is all. You do concede, for purposes of this motion, that your client is causing or likely to cause serious damage to the national security; is that not correct?

MR. WULF: I don't know that I can make that concession.

THE COURT: I thought that was the basis upon which we have been discussing the matter for the last fifteen minutes.

MR. WULF: Well, to make that concession—our [13] position will be that everything that he is doing within a First Amendment context, that he is publishing and that he is speaking and he is writing—

THE COURT: Then your initial statement to me was quite incorrect.

MR. WULF: But there is nothing in there—

THE COURT: There are substantial factual issues before me then. You can't have it both ways, Mr. Wulf. I thought I was very explicit with you.

I didn't mean to force you into anything but I thought I was quite explicit.

MR. WULF: Yes.

THE COURT: If you wish to withdraw that concession, you may do so. We will then consider what is the best way to proceed in this case.

MR. WULF: I am attacking the regulation on the grounds there is no authority. For that purpose—I think for that purpose I would concede any charge they want to make against him. Sure. That was the reference that I was making.

If they don't have authority to adopt or enforce the regulation, I don't care what the charges are.

THE COURT: That is what I thought you were saying to me.

MR. WULF: Right. I continue to say that.

[14] THE COURT: All right, and that is the only issue

then. You do make that concession for purposes of attacking the regulation.

MR. WULF: But I still would intend to attack the regulation on the ground that it is over-broad and that it can't be applied to Agee or to anyone else because it does affect First Amendment right, First Amendment interest. It would be a classic over-breadth argument.

THE COURT: No, I can't follow that. The affidavits before me—I haven't seen any transcript. I don't know whether any testimony was presented.

MR. WULF: There is none.

THE COURT: Before Judge Parker.

MR. WULF: No, there isn't any, Your Honor.

THE COURT: But the affidavit of Mr. Newsome, for example, specifically calls attention to the information in the press to the effect that your client is contemplating going to Iran for the purpose of participating in an international tribunal which many people would think was to be a firing squad tribunal developed for the purpose of expediting the demise of some of the hostages.

MR. WULF: That appears in Under-Secretary Newsome's affidavit, based upon a story in the New York Post two or three weeks ago.

THE COURT: I understand that. If that is a [15] disputed fact, then we have a different kind of problem before us.

MR. WULF: The fact that the story appeared in the Post is not disputed. I would be happy to submit that with the summary judgment motion papers so you can read it for yourself. It is a story—

THE COURT: You see, you are way off tangent, Mr. Wulf. You are way off the wall on what we are talking about.

You can't stand up in front of me and say that there are no factual issues and then when I press that you concede the facts you say, well, they are just unauthorized and unsubstantiated pieces of paper in the press.

Do you follow what I mean? We have got to go at it one way or the other. I am willing to go at it either way.

MR. WULF: I am trying to feel my way as we are discussing it.

THE COURT: If you want to take some time to feel your way, I don't want to press you. I have a jury trial starting in ten minutes. I can see you again in the middle of the day. Either we have this concession or we don't have this concession.

MR. WULF: Could I just consult with my colleague for a second and I will be right back?

[16] THE COURT: Surely.

(Whereupon counsel consulted.)

MR. WULF: If you are saying, Your Honor, that you will not hear an over-breadth argument and that the only argument that you want to hear is the question of basic authority, we will argue just that question and we will concede the charges as they are made in the letter to Agee, which is part of the record.

THE COURT: Right.

MR. WULF: O.K. Whatever they charge, we will concede it is true.

THE COURT: For purposes of challenging the regulation.

MR. WULF: For purposes of challenging their authority to adopt and apply the regulation.

THE COURT: That is where I thought we were.

MR. WULF: Right. We went around a little bit. That is what I first conceded. I don't want to argue the over-breadth issue. I guess I will have to save that for another day.

THE COURT: You can argue the over-breadth issue but we have to do it in a factual context and I think you are aware that frequently the over-breadth argument is not accepted where its application to an individual is within the core of the permissible area of the regulation.

You can't [17] argue under another set of facts, under some other different situation, this would be over-broad.

MR. WULF: I find the over-breadth doctrine a little bit elusive sometimes as a matter of fact.

THE COURT: It is. I recognize that.

Are you satisfied with respect to this?

MR. WHITAKER: Your Honor, the reason I was pressing for the administrative process before was because I was confused about this concession; but as I understand it, there is a concession for purposes of all of the arguments that he has raised, all of the claims in his complaint that Mr. Agee's conduct clearly falls within the coverage of the regulation, that is, his activity is likely to cause or does cause damage to the national security.

THE COURT: Yes, as you have set it out in your letter to him.

MR. WHITAKER: Yes.

MR. WULF: Yes. That is agreed then.

THE COURT: All right. Then the schedule is as we set it out.

We will have the argument on the 18th. You will file on Wednesday and the Government will file on the following Monday.

MR. WULF: All right. Thank you for hearing us, Your Honor.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 79-3491

PHILIP AGEE, PLAINTIFF,

-against-

SECRETARY OF STATE, DEFENDANT.

STATEMENT OF MATERIAL FACTS

In compliance with Local Rule 1-9(h), plaintiff submits the following statement of the material facts as to which he contends there is no genuine issue to be tried:

1. Plaintiff is a former employee of the Central Intelligence Agency.

2. Plaintiff resides in Hamburg, West Germany.

3. Plaintiff is a citizen of the United States.

4. Plaintiff was issued United States passport, No. Z 3007741, on March 30, 1978, with an expiration date of March 29, 1983.

5. On December 23, 1979, plaintiff was notified in writing that, under the purported authority of 22 C.F.R. §§ 51.70(b)(4) and 51.71, his passport was revoked, effective immediately.

6. The letter of revocation gave the following reasons for the revocation:

> The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that compaign you have travelled in various countries (in-

cluding, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.[1]

7. Revocation of plaintiff's passport has caused an will continue to cause him irreparable injury.

/s/ _____
MELVIN L. WULF
Clark Wulf Levine & Peratis
113 University Place
New York, NY 10003
(212) 475-3232

/s/ _____
CHARLES S. SIMS
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, NY 10016
(212) 725-1222

/s/ _____
ALLAN ADLER
DAVID LANDAU
c/o National Security Project of the American Civil Liberties Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20003
(202) 544-5380

Attorneys for Plaintiff

JANUARY 9, 1980

[1] Plaintiff concedes the truth of these allegations only for purposes of this motion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3491

PHILIP AGEE, PLAINTIFF,

v.

SECRETARY OF STATE, DEFENDANT.

PLAINTIFF'S STATEMENT OF GENUINE ISSUES

In response to Defendant's Cross-Motion for Summary Judgment, and his Statement of Material Facts as to which there is no Genuine Issue, Plaintiff hereby submits his responsive statement with respect to each of the Defendant's numbered paragraphs:

1. No genuine issue.

2. No genuine issue.

3. No genuine issue.

4. The December 23rd letter did not advise plaintiff of his right to "an *immediate* administrative hearing under 22 C.F.R. § 51.80 through § 51.105", but only to his right to a hearing thereunder.

5. No genuine issue.

6. On Friday, December 28, 1979, Mr. Agee did decline the offer of a hearing in Hamburg or Washington on Monday, December 31, 1979, but he did not thereby, or in any other way, waive his right to an administrative hearing.

7. For the purposes of resolving the claims raised in his motion for summary judgment, Plaintiff has agreed not to contest the truth of the charges against him in the December 23, 1979 letter, but he has not conceded the truth of those charges for any other purposes. Moreover, he has not agreed that his activities "fall within the core coverage of the challenged regulation", Def. Mem. ¶ 7, believing

that that question is irrelevant under *Aptheker v. Secretary of State*, 373 U.S. 500, 516–517.

Respectfully submitted,

/s/ _____
MELVIN L. WULF
Clark Wulf Levine & Peratis
113 University Place
New York, NY 10003
(212) 475-3232

/s/ _____
CHARLES S. SIMS
c/o American Civil Liberties
Union Foundation
22 East 40th Street
New York, N.Y. 10016
(212) 725-1222

/s/ _____
ALLAN ADLER
DAVID LANDAU
c/o National Security Project
of the American Civil Liberties
Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20003
(202) 544-5380

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No.

PHILIP AGEE, PLAINTIFF,

-against-

CYRUS R. VANCE, SECRETARY OF STATE, DEFENDANT.

AFFIDAVIT

State of New York)
County of New York) ss.:

MELVIN L. WULF, being duly sworn, deposes and says:

1. I am a member of the firm of Clark Wulf Levine & Peratis, 113 University Place, New York, New York 10003, and attorney for Philip Agee, the plaintiff in this law suit. I make this affidavit in support of an application for a temporary restraining order and preliminary injunction.

2. I have known Mr. Agee since 1973, and have represented him as his attorney in several matters since that time. Because Mr. Agee lives abroad, I am making this affidavit. The contents are based either upon my own personal knowledge of the facts, or are drawn from multiple telephone conversations which I have had with Mr. Agee during the past ten days.

3. Philip Agee, the plaintiff in this case, is a citizen of the United States. He is a former employee of the Central Intelligence Agency. He is the author of *Inside the Company: A CIA Diary*, published by Stonehill Publishing Co. in 1975, and he is the author of various articles concerning the activities of the CIA. He is a leading critic of clandestine CIA activities throughout the world.

4. Mr. Agee presently lives in Hamburg, West Germany, with his wife, an American citizen, and his fifteen-

year-old son, Christopher, also a citizen of the United States. His wife is a member of the ballet of the Hamburg Staatsoper, under a contract which expires September 1981. His son is enrolled in the 10th grade of the International School of Hamburg.

5. During all of the times that Mr. Agee has lived abroad, he has held a valid U.S. passport. His current passport, No. Z3007741, was issued on March 30, 1973, and expires on March 29, 1983.

6. On December 23, 1979, the United States Consul General in Hamburg, West Germany, delivered to Mr. Agee a letter notifying him that his passport had been revoked. A copy of the letter is attached hereto. It notifies Mr. Agee of his passport's revocation under the provision of 22 CFR § 51.71. It states that the action is predicated on a determination by the Secretary of State under 22 CFR § 51.70(b)(4), that his "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." It purports to rest that determination upon the following allegations:

> Since the early 1970s, it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign, you have travelled in various countries, (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba and Germany) and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

The letter also informs Mr. Agee of his right of administrative review and appeal under Subpart F of Part 51 of Title 22, C.F.R. The text of that letter is attached to this affidavit.

7. Revocation of Mr. Agee's passport has resulted in the following immediate and irreparable injury to him. First, he is threatened with deporation from West Germany specifically because of his passport's revocation. Two, his de-

portation from West Germany will result in forced separation from his wife who is bound by contract to her employment with the Hamburg Staatsoper Ballet until September 1981, and will seriously disrupt his son's education. Three, deportation from West Germany will result in forced separation from the established base from which he carries on his occupation as a journalist, and where he keeps his voluminous files and records, which are indispensable to him. Four, even if Mr. Agee is not deported from West Germany, he is now prevented from travelling outside of West Germany, since most countries will not admit a traveler without a valid passport. Since his work as a journalist requires widespread travel, including a trip which he has had scheduled for the week of January 5th, revocation of his passport has effectively deprived him of his right to follow his chosen occupation, and has stripped him of his First Amendment rights. It will also deprive the American public of the right to receive the information which Mr. Agee chooses to publish.

8. Mr. Agee will also suffer irreparable injury if he is required to exhaust his administrative remedies in advance of bringing this constitutional challenge to those regulations, even if he is not deported from West Germany. Exhaustion of administrative remedies will be time-consuming in this case. For example, after Mr. Agee demands a hearing, the Department of State has 60 days to initiate the hearing, 22 C.F.R. § 51.81, and the case promises to be protracted. During all of that time, Mr. Agee's passport will remain revoked, he will be unable to travel outside West Germany, and his activities as a working journalist will be substantially if not totally impaired. Moreover, the threat of early deportation from West Germany is substantial and would itself cause irreparable injury.

9. In addition, the requirement of exhaustion would be futile in this case, for the Secretary of State, who initially determined personally to revoke Mr. Agee's passport as required by § 51.70(b)(4), also has final authority in the matter. 22 C.F.R. § 51.104. I was, in fact, told by the Department of State, Legal Advisor, Mr. Robert Owen, in a

phone conversation on December 26, 1979, that the Department had given extensive attention to the question whether to revoke Mr. Agee's passport. Having decided to do so, it is not likely that anything which comes out in the hearing will persuade the Secretary that his initial decision was wrong.

/s/ _____
MELVIN L. WULF

Sworn to before me this 28th day of December, 1979.

/s/ _____
STEPHANIE J. DIXON
Notary Public

STEPHANIE J. DIXON
Notary Public, State of New York
No. 03-4683598
Qualified in Bronx County
Commission Expires March 30, 1980

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1125

PHILIP AGEE, PLAINTIFF-APPELLEE

v.

CYRUS VANCE, DEFENDANT-APPELLANT

Affidavit

Philip Agee, being duly sworn, deposes and says:

1. I am the plaintiff-appellee in the above entitled case. I make this affidavit in opposition to the defendant's motion for stay pending appeal.

2. I presently reside in Hamburg, West Germany, and have regularly consulted with my attorneys about this case by telephone.

3. On February 4, 1980, my attorneys read to me over the telephone the two affidavits submitted by John N. McMahon in support of the government's application for a stay.

4. Based on the assertions and innuendo of the two McMahon affidavits, I provide the following facts.

5. I have and have had no intention of traveling to Iran while any Americans are being held hostage, nor do I even have any present intention of doing so after the hostages are released.

6. I have and have had no intention of revealing the names of any possible CIA personnel in Iran while any Americans are being held hostage.

7. I have never been invited to Iran by its government, The Revolutionary Council, or any representative thereof, for the purpose of sitting on any tribunal whatsoever, or for any other reason. If I should receive such an invita-

tion, I would decline such an invitation until the American hostages are released, if then.

/s/ _____
PHILIP AGEE

Sworn to before me this day of February, 1980.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1125

PHILIP AGEE, PLAINTIFF-APPELLEE

v.

CYRUS VANCE, DEFENDANT-APPELLANT

Affidavit

Melvin L. Wulf hereby declares as true under penalty of perjury, as follows:

1. I am plaintiff's attorney. I make this affidavit in further opposition to the government's motion for a stay pending appeal in this case.

2. We have submitted an unsigned affidavit by Mr. Agee in opposition to the government's motion for a stay pending appeal. The affidavit is unsigned because Mr. Agee lives in Hamburg, West Germany, and time is of the essence in this stay application which affects Mr. Agee's constitutionally protected right to travel.

3. The contents of the affidavit are based upon a telephone conversation which I and my co-counsel, Mr. Charles S. Sims, had with Mr. Agee this date. We read Mr. Agee the two affidavits submitted by Mr. John N. McMahon in support of the government's motion for a stay, and discussed the contents of Mr. Agee's reply, as contained in this affidavit.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 1980.

/s/ _____
MELVIN L. WULF

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1125

PHILIP AGEE, PLAINTIFF-APPELLEE

v.

CYRUS VANCE, DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 1980 I served the foregoing Affidavits of Philip Agee and Melvin L. Wulf upon counsel for the Defendant-appellant by postage prepaid mail to:

Michael F. Hertz
Civil Division, Room 3631
Department of Justice
Washington, D.C. 20530

/s/ _____
MELVIN L. WULF

AFFIDAVIT

Philip B.F. Agee does depose and say as follows:

1. For almost ten years I have made my livlihood by writing and lecturing on American foreign policy and international relations. This work required and continues to require my frequent travel to various countries.

2. My ability to exercise this profession has been severely curtailed during the six months since the Secretary of State revoked my passport. This result is precisely the State Department's purpose in revoking my passport, and they have achieved it despite the Federal District Court's decision in my favor in January 1980. So long as the Court of Appeals continues its stay of the District Court's order

for restoration of my passport, I will be unable properly to exercise my profession and earn my livelihood.

3. For the entire period of the revocation I have been unable to comply with an order of the Civil Court of Rome requiring my presence for testimony in a suit brought to recover monies owed by an Italian company. A copy of the order is attached. Although the hearing was several times postponed, the case is now stalled until I can appear.

4. I was invited by the government of Grenade to attend certain ceremonies and activities in that country in March. My inability to attend prevented me from writing and publishing articles on developments there and in the Carribean in general. A copy of the invitation is attached.

5. I have regular professional and commercial relations with associates in Switzerland that require frequent travel to that country. For six months I have been unable to fulfill my obligation in this respect.

6. I was Special Consultant for the American documentary film, "On Company Business," recently shown on national Public Television in the U.S. I have undertaken a commitment to promote the release of this film on television and theaters in Europe which requires that I travel to many European countries for personal contacts and negotiations. Without a passport I am unable to fulfil this obligation.

7. From September of each year until July of the following year my wife's profession prevents her from taking vacation time. Normally my wife, my sons and I spend vacations during August visiting family and friends outside West Germany. This year, if the stay against restoration of my passport continues, we will be prevented from seeing these people and from fulfilling our vacation plans.

8. My wife has been offered professional contracts that would require our moving from West Germany to another country in Western Europe. Because of the stay of the order to restore my passport and the uncertainty involved, she is penalized professionally because she cannot give serious consideration to other commitments until we know

that I am able to change residence to another country with her.

9. My work involves nothing more than the exercise of my rights to speak and to write, as well as to travel, however critical of certain government activities I may be. I have never been accused of violating the laws of any country. Yet with each passing day without my passport, the Circuit Court of Appeals is preventing me from exercising those rights, and I am injured professionally and financially despite the District Court's decision five months ago that my passport must be returned.

10. I ask the Circuit Court of Appeals to discontinue the stay of the District Court's order.

On this 27th day of June 1980 I declare under penalty of perjury that to the best of my knowledge and belief, the statements made herein are true and correct.

/s/ _____

PHILIP B.F. AGEE
Hamburg, West Germany

Attachments

FEDERAL REPUBLIC OF GERMANY
STATE AND CITY OF
FREIE UND HANSESTADT HAMBURG
CONSULATE GENERAL OF THE UNITED STATES
OF AMERICA

Subscribed and sworn before me this 27th day of June, 1980.

/s/ _____

JAMES P. WALSH
Vice Consul

TRIBUNALE CIVILE DI ROMA

SEZIONE CIVILE

GIUDICE ISTRUTTORE DOTT. SALIME'

Il giorno dodici marzo 1979 sono presenti i procuratori delle parti. A questo punto il Giudice Istruttore Dott. Salimè fa presente che da questa udienza sostituirà il Giudice Istruttore Dott. Feliciangeli, in via definitiva a seguito di provvedimento presidenziale. Stante la necessità di sentire direttamente dalle aprti, al fine di fornire al Giudice una esauriente visione della causa, l'Avv. Marina Petronio chiede che il Giudice voglia disporre l'interrogatorio delle parti sulle circostanze dedotte nell'atto introduttivo del giudizio.

Per la Società convenuta l'Avv. Francioni, associandosi alla richiesta della collega non si oppone, rilevando anch'egli l'opportunità di sentire dalle parti lo svolgimento dei fatti per poter interpretare il comportamento dell'attore e della convenuta.

Il Giudice Istruttore

dispone procedersi a interrogatorio libero delle parti al fine di esaminare e di valutare la fondatezza della doanda attrice e fissa per la loro comparizione l'udienza del 1° giugno 1979 alle ore 10.30 davanti allo stesso Ufficio.

PER COPIA

E' copia fotostatica conforme all'originale esistente nel fascicolo di ... R.G. n 15039/78 Sez ...
G.I. dott ... della causa civile

TRA

AGEE

E

Miss Giuseppe Lopez

che si rilascia a richiesta del sig ...

Roma, li 17 MAR 1979

IL CANCELLIERE

TRIBUNALE CIVILE E PENALE DI ROMA

OFFICE OF THE HIGH COMMISSIONER
FOR GRENADA

Mr. Phillip Agee 29/2/80
C/O Miss Roberge
Schluter Strasse 81,
2000, Hamburg 13,
West Germany,

Dear Mr. Agee,

I wish on behalf of the Prime Minister and the People's Revolutionary Government of Grenada to invite you to attend the March 13th Anniversary Celebrations of the Grenada Revolution.

We regret the late invitation as you are expected to take part in two symposiums, the first one on March 4th and the second one on March 6th.

You will be the guest of the Government for accomodation, transport facilities and other hospitalities.

I hope you will be able to accept this invitation.

Yours Sincerely,

/s/ _____
FENNIS AUGUSTINE
High Commissioner

CERTIFICATE OF SERVICE

I, ROBERT J. BARNHART, hereby certify that on this 2nd day of July, 1980, I served the attached Appellee's Opposition to Appellant's Motion for A Stay upon appellant by personally delivering a copy to:

MICHAEL HERTZ
RM 3636
Department of Justice
Washington, D.C. 20530

/s/ _____
ROBERT J. BARNHART

JULY 2, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2788

PHILIP AGEE, PLAINTIFF,

v.

CENTRAL INTELLIGENCE AGENCY, ET AL., DEFENDANTS;

UNITED STATES OF AMERICA, INTERVENING DEFENDANT/ COUNTERCLAIMANT

MEMORANDUM AND ORDER

As a condition of his employment with the CIA, Agee entered into a Secrecy Agreement with that agency which limited his right to disclose intelligence information. Alleging that the agreement had been violated and that Agree threatened to violate it again in the future, the United States intervened in this Freedom of Information Act suit. It seeks an order that would return to the Government all sums earned by Agee from certain prior writings disseminated in violation of the Secrecy Agreement and to enjoin further breaches of the agreement. The matter is before the Court on cross-motions for summary judgment which were fully briefed and argued.

In his Secrecy Agreement signed on July 22, 1957, Agee stated that he would "undertake not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment by the Agency without specific prior approval by the Agency." *See* Ex. A, Gambino Affidavit. Agee's CIA employment ceased on November 22, 1968. At no time has he been released from this undertaking.

Two essential facts are undisputed. Agee does not deny that he has published books containing intelligence information relating to CIA activities without prior submission

to the agency and in violation of the Secrecy Agreement[1] nor does he deny that he intends to continue his work as an author and journalist, writing on intelligence activities, without complying with the Secrecy Agreement. Moreover, the validity of the standard Secrecy Agreement which Agee executed has been strongly upheld in a recent decision of the Supreme Court, *Snepp* v. *United States*, 48 U.S.L.W. 3527 (U.S. Feb. 19, 1980).[2]

Opposing the proposed order vigorously, Agee offers two affirmative defenses. First, he asserts that the United States comes before this Court with "dirty hands" and should not be granted the equity relief sought. Second, he contends that he is the victim of impermissible "discriminatory enforcement" because the United States has allegedly chosen to litigate against him on the basis of the content of his writings, an impermissible criterion for government action, while choosing not to prosecute individuals whose writings are not so unfavorable to the Agency.

Agee's "dirty hands" argument lacks merit. In a lengthy affidavit, Agee recites a litany of supposed wrongs allegedly perpetrated by government representatives against plaintiff beginning in 1971, three years after plaintiff left the CIA and about the same time that plaintiff began his activities against the agency. But even if these wrongs occurred, which is disputed, they would not foreclose the relief sought by the United States here. In invoking the "dirty hands" doctrine, it is necessary that the wrongs complained of have a close nexus to the cause of

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[1]The United States points to two books among Agee's many publications, *Dirty Work: The CIA in Western Europe* and *Dirty Work II: The CIA in Africa*. Agee was not the sole author of either book. He acknowledges having written a third book, *Inside the Company: CIA Diary*, that also was published without having been submitted for clearance.

[2]The Agreement also was considered in the lower court opinion in *Snepp*, *see* United States v. Snepp, 595 F.2d 926 (4th Cir. 1979), and in Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975), and United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

action. *See, e.g., Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240, 245 (1933); *Neal-Cooper Grain Co.* v. *Kissinger*, 385 F. Supp. 769, 778 (D.D.C. 1974). There is no such nexus here. Plaintiff had long since left the agency when these incidents occurred and the alleged wrong-doing by the agency since 1971 is not sufficiently related to Agee's failure to comply with the Secrecy Agreement.

The discriminatory enforcement argument, however, is more substantial. It is clear that the Government could not enforce the Secrecy Agreement solely on the grounds of sex or of race, *i.e.*, by enforcing it only against women or against blacks. Similarly, it is certain that the Government cannot use enforcement of the Secrecy Agreement for the sole purpose of suppressing speech that is unfavorable to the agency. Agee contends that the agency's actions support his claim that the Government's present motion is primarily motivated by the agency's disagreement with his views. This is sharply denied. On the limited facts submitted by the parties it is difficult, however, to determine to what extent, if any, enforcement of the agreement against Agee is based on the impermissible ground that the agency was offended by the unfavorable material Agee has written.

The United States argues that Agee is in a category by himself with regard to enforcement of the Secrecy Agreement, and that his conduct has been egregious and totally in disregard of the agreement, to the severe detriment of the United States. There is no dispute that Agee has openly flouted his refusal to submit writings and speeches to the CIA for prior approval, and has expressed a clear intention to reveal classified information and bring harm to the agency and its personnel.[3] Thus the risks which at-

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[3] The Government notes, in particular, a press release issued by plaintiff from London on October 3, 1974, in which plaintiff stated:

> Today I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where

tend Agee's continuing refusal to abide by the agreement are undoubtedly far greater than the risks posed by many others covered by the agreement.

Agee, however, has presented evidence indicating that the CIA's past enforcement record bears a considerable correlation with the agency's perception of the extent to which the material is favorable to the agency. A reading list of books concerning the CIA, prepared by the CIA itself for recruitment purposes, noted five works as "more critical of the Agency." Four of these works have spawned suits by the Government to enforce the agreement, whereas no suits have been filed against other authors whose works were not listed as "more ctitical," even though some of those authors concededly did not submit their material for prepublication review. Plaintiff thus has raised a factual issue as to whether the Government's past enforcement has been clouded by content considerations rather than wholly legitimate concerns for security.

In view of the foregoing, the Court has determined that it would not be appropriate, on these motions for summary judgment, to impose a constructive trust over the proceeds of Agee's two books, or to order an accounting. Not only is the civil law of discriminatory enforcement uncertain but there are, as noted, unsettled factual issues that can only come clear through time-consuming discovery, if the issues were to be pursued. The past, however, is no mirror of the future. The agency has recently prepared a policy statement on its prepublication review program that demonstrates a sensitivity to First Amendment concerns. Backed by *Snepp*'s endorsement, the agency currently is carrying out a far more systematic and organized program for enforcing its Secrecy Agreement rights. There is no showing that anyone who announces in advance an intention to ignore the agreement and who has

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they are operating; secondly, to seek within the United States to have the CIA abolished. *See* McMahon Affidavit at 3.

It should also be noted that Agee is seeking release of approximately 20,000 documents from the CIA alone in this action, obviously to support his continuing campaign.

egregiously violated it in the past will not be subjected to an enforcement action. The agency, moreover, expressly states that "[a]pproval will not be denied solely because the subject matter may be embarrassing to or critical of the Agency." Furthermore, the "expressed or presumed attitude of a person toward the United States Government or the Agency is not a factor" in determining whether a person suspected of violating the Secrecy Agreement will be recommended for prosecution. (*See* Regulation HR6-2 and Policy of Enforcement, attached to Turner's Affidavit.)

Accordingly, the Court believes that it is entirely appropriate under all the facts and circumstances of this case to issue an injunction against Agee requiring his full compliance with the Secrecy Agreement in the future. Agee has shown a flagrant disregard for the requirements of the Secrecy Agreement, justifying this Court's action to require future compliance and to protect the security of the United States.

The motion for summary judgment filed by the United States is granted in part and a permanent injunction enjoining Agee from further breaches of his Secrecy Agreement shall issue in the form attached. In all other respects the motions of both parties are denied.

SO ORDERED.

/s/ _____

GERHARD A. GESELL
United States District Judge

OCTOBER 2, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2788

PHILIP AGEE, PLAINTIFF,

v.

CENTRAL INTELLIGENCE AGENCY, ET AL., DEFENDANTS;

UNITED STATES OF AMERICA, INTERVENING DEFENDANT/COUNTERCLAIMANT

PERMANENT INJUNCTION

This matter having been heard on cross-motions for summary judgment, and the Court having granted the United States a permanent injunction, now therefore it is hereby

ORDERED:

(1) That the plaintiff, Philip Agee, is permanently enjoined from further violation of the terms of his Secrecy Agreement with the Central Intelligence Agency executed July 22, 1957, and, in particular, is enjoined from disseminating, or causing to be disseminated, any information or material relating to the Central Intelligence Agency, its activities, or intelligence activities generally, without the express written consent of the Director of the Central Intelligence Agency or his representative;

(2) That plaintiff's counsel shall promptly serve plaintiff with a certified copy of this Order and shall promptly file with the Court proof of receipt by plaintiff of this Order; and

(3) That the Clerk of Court shall serve plaintiff with a certified copy of this Order by mailing the same to plaintiff

at Schluterstrasse 81, Hamburg, Germany, by certified mail.

/s/ _____

GERHARD A. GESELL
United States District Judge

OCTOBER 2, 1980.

Supreme Court of the United States

No. 80-83

EDMUND S. MUSKIE, SECRETARY OF STATE OF THE UNITED STATES, PETITIONER,

v.

PHILIP AGEE

ORDER ALLOWING CERTIORARI.
FILED OCTOBER 6, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The motion of respondent to vacate the stay heretofore entered by the Chief Justice is denied.

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No. 80-83

IN THE

Supreme Court of the United

OCTOBER TERM, 1980

EDMUND S. MUSKIE,
SECRETARY OF STATE,

Petitioner,

—v.—

PHILIP AGEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1980

EDMUND S. MUSKIE,
SECRETARY OF STATE,

Petitioner,

v.

PHILIP AGEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Philip Agee, respectfully requests the Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia.

QUESTIONS PRESENTED

1. Whether 22 C.F.R. §51.70(b)(4) and 51.71, the sole authority under which the Secretary of State purported to revoke respondent's passport, are statutorily authorized.
2. If so, whether the Secretary's revocation of respondent's passport and the application of those regulations in the circumstances of this case violate respondent's rights secured by the First and Fifth Amendments to the Constitution.

STATEMENT OF THE CASE

1. The Statement set forth in the Petition includes a variety of accusations against respondent which are completely irrelevant to the resolution of this case, and serve no purpose other than to attempt to prejudice the Court by making respondent appear to be an enemy of the state. Those accusations are

based on hearsay and innuendo, and in every respect material to the resolution of this case they are untrue. In fact, respondent is an openly severe critic of the Central Intelligence Agency who has always expressed his criticism in ways protected by the First Amendment. Accusations by officials of the Central Intelligence Agency are before the Court - irrelevant though they are - because they were filed by the government in support of its stay applications and included as appendices to the petition, even though they are not properly part of the record on certiorari. Respondent did not undertake to contest all those accusations because counsel believed the decision whether to issue a stay would turn principally on the absence of any likelihood that the government would succeed on appeal, and that in any event the allegations were not probative of any issues germane to the stay applications.

All of this having been said, it is nevertheless crucial at the outset to dispel two accusations in particular which are repeated throughout the petition.

First, as the opinions below by both Judge Robb and Judge Gesell make clear, (see Pet. App. 4a; Pet. App. 94a), respondent never made any "express concession that his international travel activities have caused and probably will continue to cause serious damage to the nation's security or foreign policy." (Pet. 2 n.1; see also Pet. 6).[1/] To the contrary, the "concession" was expressly in the nature of

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1/ Citations to the Petition for Certiorari are given as "Pet. "; to the various appendices to the Petition, as "Pet. App. a"; to the appendix in the Court of Appeals as "Ct. App. ".

a demurrer, to enable the parties to join issue immediately on the legal question whether 22 C.F.R. §§51.70(b)(4) and 51.71 were statutorily authorized. Ct. App. 15-18, 29, 32, 46. The statutory authorization question did not depend in the courts below, and should not depend here, on the nature of respondent's activities; either the regulation is authorized, or it is not. Similarly, as this Court instructed in a right to travel case, the question of statutory overbreadth does not depend on the particular facts regarding a litigant's past or proposed travel. Aptheker v. Secretary of State, 378 U.S. 500, 515-517 (1964). See Ct. App. 46.

Second, there is absolutely no basis on this record, or in fact, to justify revocation of respondent's passport by reference to recent events in Iran or the Middle East. Respondent has never traveled

to that region.[2/] In an uncontradicted affidavit, he has stated that he has never been invited to Iran by its government or the revolutionary council or any of their representatives; that he has no intention of traveling to Iran either before or after the hostages are released; and that if he were invited to Iran, he would not go for any purpose whatever at least for so long as any Americans are held hostage there. Ct. App. 98. The web that petitioner has tried to weave to ensnare respondent in recent Iranian events is spun wholly out of a single unsubstantiated and uncorroborated article in the New York Post on 17 December, 1979, (see Pet. App. 116a),

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2/ The letter informing respondent that his passport had been revoked referred to his travel in "Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany". Pet. App. 120a.

an article which respondent has repeatedly informed the government had no basis in fact. E.g., Ct. App. 98.

2. The only facts relevant to the disposition of this lawsuit are that respondent is a journalist and author specializing in matters of international politics. He is an internationally known opponent of the clandestine activities conducted abroad by the Central Intelligence Agency. He resides in Hamburg, West Germany, with his wife, an American citizen, and his fifteen year old son, Christopher. His wife is a member of the ballet of the Hamburg Staatsoper, under a contract which expires in September, 1981. His son is enrolled in the 10th grade in the International School of Hamburg.

Respondent was issued a United States passport on March 30, 1978, with an ex-

piration date of March 29, 1983. He has used that passport extensively, both for personal travel with his family (to which the government has no objection), and for travel which the government opposes. On December 23, 1979, he was handed a letter by the United States Consul-General in Hamburg, notifying him that his passport was revoked in its entirety. The letter invoked the purported authority of C.F.R. §§51.70(b)(4) and 51.71, and asserted that:

> The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have traveled in various countries (including among others, Mexico, the

> United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind. (A. 13).

Thus, contrary to the implications of the petition, and the government's repeated references to Snepp v. United States, No. 78-1871 (Feb. 19, 1980), see Pet. 2-3, respondent's passport was not revoked on some ground peculiar to former CIA agents, but rather on a ground which would, if upheld, authorize revocation of any person's passport if its conditions were met. The government has not attempted to rely on any agreement between respondent and the Central Intelligence Agency to justify the revocation, either initially, App. G infra, at 120a, or before the courts below

or this court. [3/] The agreement between respondent and the CIA does not purport to encumber respondent's right to travel.

3. On December 31, 1979, respondent filed suit to challenge the revocation of his passport, asserting five grounds:

1) that 22 C.F.R. §§51.70(b)(4) and 51.71 were not authorized by Congress;

2) that 22 C.F.R. §51.70(b)(4) and 51.71 were vague and overbroad;

3) that summary revocation prior to any notice or informal hearing violated procedural due process;

3/Accordingly, reliance on such a theory would be unavailing here. SEC v. Chenery Corp., 332 U.S. 194, 196 (1974). Judge Robb similarly disposed of the government's belated, and half-hearted, reliance on 22 U.S.C. §1732. See Pet. App. 9a.

4) that revocation violated respondent's right to travel protected by the Fifth Amendment; and

5) that the passport was revoked to punish respondent for exercising his First Amendment rights, and to suppress his criticism of official government policy.

To draw the statutory authorization question immediately and squarely before the Court, relying on Aptheker v. Secretary of State, 378 U.S. at 516-517, respondent agreed not to contest the Secretary's allegations, although he carefully insisted that the factual truth of the charges was not thereby admitted. Ct. App. 15-18, 29, 32, 46. On cross motions for summary judgment, Judge Gerhard Gesell declared 22 C.F.R. §51.70(b)(4) invalid and ordered the Secretary to restore

respondent's passport. Pet. App. 99a.[4/] He held that the Congress had not expressly authorized the executive to revoke passports on national security grounds, and that the Secretary had not established implicit authorization from a "sufficiently substantial and consistent administrative practice to warrant the implied approval of Congress". Pet. App. 95a, quoting Zemel v. Rusk, 381 U.S. 1, 12 (1965).

4. On appeal, the Court of Appeals affirmed. Writing for himself and Judge Wald, Judge Robb followed the path prior

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4/Because the case presented "a pure question of law" Judge Gesell did not require futile exhaustion of administrative remedies. Contrary to petitioner's assertion, respondent did not waive his right to an administrative hearing if his facial challenge to the regulations was rejected. Ct. App. 45-46.

decisions of this Court had carefully laid out. He canvassed, as had Judge Gesell, the government's impoverished collection of claims of regulatory authority and the single instance of its imposition, and easily concluded that the Secretary's showing was "inapposite and unpersuasive". The Court also found significant the repeated refusal of Congress to enact legislation requested by the Secretary of State to authorize passport denials for persons whose activities would "seriously impair the conduct of the foreign relations of the United States" or would damage the national security. Pet. App. 12a n.4.

Judge MacKinnon dissented, measuring the reach of the Congressional delegation of passport revocation authority by his

personal distaste for respondent's activities.[5/]

REASONS FOR DENYING THE PETITION

None of the reasons set forth in this Court's Rule 17 suggest that the writ should be granted. Judge Robb's careful decision below, in which he affirmed identical conclusions reached by the able district court, presents no conflict with decisions of other courts. Far from conflicting with decisions of this Court, it in fact faithfully follows more than twenty two years of right to travel jurisprudence. Reversal of the decision below would effectively reverse both Kent v. Dulles, 357 U.S. 116

5/The personal nature of Judge MacKinnon's dissent is reflected in his injudicious proposal of draft indictments, all of which depend on "facts" reported by the New York Post that Mr. Agee has denied, and that are untrue. The government does not contend otherwise. See Pet. 20 n.17.

(1958) and Dayton v. Dulles, 357 U.S. 144 (1958). The issue presented is in Justice Frankfurter's words, "too moribund for adjudication." Darr v. Burford, 339 U.S. 200, 227 (1949)(dissenting opinion).

Largely because the question presented by the Secretary has for all practical purposes been answered by this Court in Kent v. Dulles, Aptheker v. Secretary of State and Zemel v. Rusk (and by Congress as well), it is not in any meaningful sense important. The ground rules regarding passport revocations are carefully set forth in this Court's cases. Congress has occupied the field, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-640 (1953) (Jackson, J., concurring) and the political branches of government are aware of the conditions under which passports may be revoked, and of the legislative steps necessary to broaden the scope for executive revocation.

To be sure, the executive has from time to time chafed under the regime of Kent v. Dulles, but Congress has repeatedly declined to expand the executive's revocation authority, after lengthy debates in which the protection of the constitutionally guaranteed right to travel was always a major concern.

Finally, the note sounded by the dissent and repeatedly echoed throughout the petition, "No United States Congress would ever intend to require a President to issue a passport to one with Agee's record and intentions", (Pet. App. 17a; Pet. 2-5, 18-20) is not responsive to the legal question presented in the complaint, which was whether the revocation regulations were authorized by Congress.

The Court's summary disposition in Snepp v. United States No. 78-1871 (Feb. 19, 1980), and its new Rule 23.1 necessitate a somewhat fuller treatment of the issues than

we would ordinarily undertake in opposition to certiorari.

1. The judgment below does not conflict with this Court's prior passport decisions, but instead faithfully follows them. Briefly stated, the cases hold that wherever the passport power rested prior to 1926, Congress having since legislated on the subject, it is now a Congressional power. Accordingly, if the liberty of international travel is to be regulated, "it must be pursuant to the law-making functions of the Congress." Kent v. Dulles, 357 U.S. 116, 129. Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-589 (opinion for the Court by Mr. Justice Black); id. at 637-655 (concurring opinion by Mr. Justice Jackson). Delegations of that authority by Congress will be narrowly continued. Kent v. Dulles, 357 U.S. at 129. To justify a regulation

authorizing revocation, the executive must show longstanding administrative practice sufficiently substantial and consistent to warrant a conclusion of implicit Congressional approval, since only the clearest evidence will allow Congressional silence to be a substitute for explicit and affirmative Congressional action. Id.; Zemel v. Rusk, 381 U.S. 1, 12 (1965). Finally, to prevent the exercise of First Amendment rights from serving as the real basis for limitations on the right to travel, Kent, 357 U.S. at 129-130; Zemel, 381 U.S. at 16, the Court will be particularly hesitant to assume that Congress authorized revocations based on "the character of the particular applicant", Zemel at 13.

Although the government has not attempted to rely on any inherent execu-

tive power to justify the revocation in this case regardless of Congressional actions, see Pet. App. 13a, it boldly asserts an excessively broad interpretation of 22 U.S.C. §211a which, together with the executive's broad powers and responsibilities in the fields of foreign affairs and national security, are said to support the challenged regulations. Pet. 13. But the Court has not read §211a broadly, and indeed rejected precisely that argument in Kent v. Dulles. Moreover, in a companion case to Kent, this Court held passport denial unauthorized even where the Secretary had explicitly determined that the intended travel "would be contrary to the national interest", and where the government defended the regulation challenged as necessary "to prevent the departure...of citizens when such departure...is reasonably likely to be inimical to the national safety in times of

peril". Dayton v. Dulles, 357 U.S. 144 (1958).[6] A decision for the Secretary here would require overruling Kent and Dayton, and for all practical purposes, Youngstown Sheet & Tube Co. v. Sawyer, supra, as well.[7]

6/Brief for Respondent, Dayton v. Dulles, 357 U.S. 144 (1958). The State Department statistics provided to the Senate Foreign Relations Committee during hearings in 1957 classified passport refusals under the regulation held invalid in Kent and Dayton as "passport refusals for security reasons." Pet. App. 14a n.7.

7/In Youngstown, as here, the executive claimed a need to abridge constitutional rights because of the necessities of the conduct of foreign policy (and, there, the Korean War). The Court recognized the necessity, but rejected the argument, holding that Congress, not the President, is entrusted with the law-making power. There, as here, Congress had explicitly rejected legislation which would have expressly authorized the action the President sought to take.

For the highlights of the legislative history of Congressional refusal to authorize passport revocations, see, in addition to

(footnote cont'd on next page)

(footnote cont'd from previous page)

the majority opinion below, Pet. App. A, at 12a n.4, Hearings on Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement Before the House Committee on Foreign Affairs, 85th Cong., 2nd Session, at 7-8 (1958)(State Department Legal Adviser's post-Kent concession that executive lacked national security revocation power); Hearings on Passport Legislation Before the Senate Foreign Relations Committee, 85th Cong., 2nd Sess., reprinted in Hearings Before the Senate Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 85th Cong., 1st Sess., at 377-380 (1957)(Under Secretary of State Robert Murphy's concession that the Secretary had "no right and no ground" to deny passports to Communists who, under 60 U.S.C. §781(8) and (15), posed harm to national security); Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess., 29-31 (1959)(comparison of pending bills and explicit recognition that current law did not authorize national security denials or revocations); Hearings on Proposed Travel Controls Before the Senate Subcommittee to Investigate the Administration of the Internal Security Act, 89th Cong., 2nd Sess., 72-73 (1966)(concession by then Acting Administrator of Bureau of Security Consular Affairs, State Department, Philip Heyman, that Congress had not authorized national security revocations). See generally, T. Ehrlich, Passports, 19 Stan. L. Rev. 129, 141 n.59 (1966).

2. The legislative history provides the government no more support than this Court's cases. In 1918, the Chairman of the House Committee on Foreign Affairs who sponsored the 1918 passport legislation pointed out that the Secretary of State was not then authorized to revoke passports on national security grounds, urged that such authority be granted because of the grave and immediate danger of wartime espionage, and stated that the discretion the Act provided would expire when the war was over. 56 Cong. Rec. 6066-6067 (1918)(remarks of Rep. Flood).[8/] The 1926 Congress must be presumed to have legislated in light of the understanding of the limited power granted in 1918, and

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8/He also specifically noted that the national security revocation authority claimed at that time was contrary to law, and could not be upheld. 56 Cong. Rec. 6066-6067 (1918).

this Court has so presumed, holding as a general rule that passport regulations enacted during the wartime measures of 1918 and 1941 are not relevant to the construction of a peacetime statute. Kent, 357 U.S. at 128.

Both Courts below quickly disposed of the government's surprising reliance on the 1978 revision of 22 U.S.C. §211a. The contraction of power to impose broad area control restriction hardly "support[s] the Secretary's construction of 22 U.S.C. §211a as a broad delegation of authority to regulate", Pet. App. 12a, particularly where the legislative history demonstrates that the 1978 revision was designed to implement the Helsinki Accords by reducing barriers to safe and easy travel between countries. See, e.g., 124 Cong. Rec. 4689-4690 (daily ed. May 31, 1978)(remarks of Chairman of the House Judiciary Sub-committee on Immigration, Citizenship,

and International Law, Joshua Eilberg, sponsor of the bill in the House)[9/]

3. The conclusion of the two courts below that the administrative practice was far too meager to warrant a conclusion of implicit Congressional authorization was fully

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9/The Secretary's reliance on such cases as Saxbe v. Bustos, 419 U.S. 65, 74 (1974) and United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979), see Pet. at 16 n.14, is misplaced. In the passport field this Court held more than twenty years ago that Congressional delegation of authority to revoke passports would be narrowly construed, and Congress has presumably legislated accordingly. Unlike the cases relied upon by the Secretary, the presumption here is that mere claims of authority without widespread, publicized practice will not be deemed approved by Congress. Kent, 357 U.S. at 129.

supported by the historical record, and the Court should not grant certiorari simply to repeat that extensive review. The substantial and publicized practice of area restrictions affecting thousands of Americans over 100 years canvassed by the Court and found sufficient in Zemel offered a far firmer basis for a conclusion of implicit authorization than the few scattered examples marshalled by the Secretary below.[10/]

10/Of the six examples cited by Judge Robb, Pet. 13a n.7, the two prior to 1926 had been specifically recognized by the sponsor of the 1918 legislation to be "beyond the law". 56 Cong. Rec. 6066-67 (remarks of Rep. Flood). The two instances in 1955, never upheld by any court, appear on their facts to be based not on national security considerations but on attempts to render allies favors by removing American "trouble-makers" from their countries. They are thus irrelevant to the authority claimed in this case.

As we have shown, the executive's consistent view of Kent as involving "national security" considerations contradicts its attempt to distinguish Kent as a case concerned solely with "beliefs or associations". The strenuous efforts to gain approval for national security revocation authority from 1958-1966, canvassed briefly, supra,[11/] coupled with repeated high-level warnings that there was "no ground" on which to revoke the passports of Communists travelling to Russia at the height of the Cold War, persuasively suggest that the executive should repair to Congress, and not this Court, for authorization of the revoca-

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11/ See also Brief for Respondent below, at 17-32.

tion power it so plainly lacks under current law. 12/

12/We note only briefly, to preserve the points should certiorari be granted, that the revocation here, even if authorized, violated rights guaranteed by the First and Fifth Amendments. Aptheker v. Secretary of State, 378 U.S. 500, 515-517, establishes both the regulation's overbreadth and respondent's standing to argue the question. Here, as in Aptheker, his actions are irrelevant to question of overbreadth. Id. See Plaintiff's Statement of Genuine Issues, Ct. App. 46. Even on the government's own arguments, a far more limited restriction of the passport to particular countries or for particular purposes would accomplish its goals. See Aptheker, 378 U.S. at 511-512. Far from casting doubt on the availability of a First Amendment challenge in circumstances such as these, Zemel v. Rusk specifically preserves a First Amendment challenge for cases where "the refusal to validate [a] passport...result[s] from...expression and association", 381 U.S. at 16, and forbids putting respondent to a choice between his First Amendment activity and his travel. Id. Finally, even assuming that the promised full hearing could follow summary revocation, at least notice and an informal opportunity be heard were required prior to summary revocation under the circumstances. See, e.g., Mackey v. Montrym, 443 U.S. 1, 11-12 (1979); Mathews v. Eldridge, 424 U.S. 319, 338 (1976); Goss v. Lopez, 419 U.S. 565 (1975).

4. As the ad hominem approach of the government indicates, this case represents what the government takes to be a golden opportunity to gain this Court's approval of a regulation that lacks the necessary Congressional sanction. Congress is presently considering legislation that might apply to some of the activities complained of, and it will be time enough to consider the constitutional questions that would be raised if that legislation is enacted. But the Court should decline even to consider the Secretary's argument that he may summarily and drastically curtail respondent's liberty on tenuous "national security" grounds simply because he sees an "unacceptable risk" in instituting the criminal proceedings which would concededly justify revocation of respondent's passport under Kent.

The more unpopular the individual

whose rights the government seeks to abridge, the more important are the procedural safeguards of the criminal law, permitting full testing of the government's "evidence" and an opportunity for public vindication. Our institutions, and the firm principle that Congress, not the Executive, has the power to legislate the conditions permitting abridgement of liberty in time of emergency, may be destined to pass away. "But it is the duty of the Court to be last, not first, to give them up." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 655 (Jackson, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

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PETITIONER

v.

PHILIP AGEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. Respondent erroneously asserts (Br. in Opp. 4) that he "never made any 'express concession that his international travel activities have caused and probably will continue to cause serious damage to the nation's security or foreign policy.' " As both courts below concluded, however, respondent "concedes that his activities are causing and likely to cause serious damage to the national security or foreign policy of the United States" (Pet. App. 94a, 3a-4a, 17a). Their concurrent conclusion on this point is based on the unequivocal statements made by respondent's counsel before the district court on January 3,

1980.[1] Accordingly, respondent may not now be heard to suggest that this Court must consider him to be merely an innocuous "journalist and author specializing in matters of international politics" (Br. in Opp. 7).

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[1]The following colloquies occurred before Judge Gesell (C.A. App. 16-17, 29, 30):

THE COURT:	In other words, you are prepared to concede that your client is causing or is likely to cause serious damage to the national security and you want to just test the regulations?
MR. WULF:	Yes. * * *
THE COURT:	And, therefore, the factual issues of whether [respondent] was causing or likely to cause serious damage to the national security would be conceded.
MR. WULF:	I would—in fact * * * I would concede it for purposes of the preliminary injunction, yes.
THE COURT:	You concede it for purposes of the determination of the validity of the regulation.
MR. WULF:	Yes, I think even under those circumstances the Secretary of State cannot on his own discretion revoke a passport. * * *
THE COURT:	I understand that legal position but I wanted to be sure when you said there were no facts in dispute that my approach would be in terms of an assumption, underlying factual assumption.
MR. WULF:	I would concede that, Your Honor.

* * * * *

MR. WULF:	[W]e will argue just that question [authority to adopt the challenged regulation] and we will concede the charges as they are made in the letter to [respondent], which is part of the record.
THE COURT:	Right.
MR. WULF:	O.K. Whatever they charge, we will concede it is true.

2. In light of respondent's express concession, this case presents the fundamental and important issue whether the Executive may revoke the passport of a citizen whose international travels are causing serious damage to the foreign policy and national security of the United States. Respondent argues that the prior decisions of this Court control this question and that in any event the legislative history shows that Congress has repeatedly determined to deny the Executive the power to revoke passports in the circumstances presented by this case. As we briefly demonstrate below, these claims are without merit.

a. Respondent asserts (Br. in Opp. 18-20) that *Kent* v. *Dulles*, 357 U.S. 116 (1958), and *Dayton* v. *Dulles*, 357 U.S. 144 (1958), are directly on point and that "[a] decision for the Secretary here would require overruling *Kent* and *Dayton*" (Br. in Opp. 20). But both *Dayton* and *Kent* involved only the question whether the Secretary could deny passports to individuals solely on the basis of their communistic beliefs and associations, and not whether the Secretary could act to protect the national security and foreign policy of the United States. See 357 U.S. at 117-120; *id.* at 150-153. Here, of course, respondent concedes that his international travels are

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THE COURT: For purposes of challenging the regulation.

* * * * *

GOV'T COUNSEL: [A]s I understand it, there is a concession for purposes of all of the arguments that he has raised, all of the claims in his complaint that [respondent's] conduct clearly falls within the coverage of the regulation, that is, his activity is likely to cause or does cause damage to the national security.

THE COURT: Yes, as you have set it out in your letter to him [revoking his passport].

GOV'T COUNSEL: Yes.

MR. WULF: Yes. That is agreed then.

causing and would continue to cause serious damage to the foreign policy and national security of the United States.[2]

b. Respondent also erroneously suggests (Br. in Opp. 20-24 & n.7) that Congress has affirmatively and repeatedly denied the Executive the power to revoke or deny passports on foreign policy and national security grounds. In 1918, Congress for the first time required American citizens to have a passport in order to enter or leave the United States. See Act of May 22, 1918, ch. 81, Section 2, 40 Stat. 559. Contrary to respondent's assertion (Br. in Opp. 22-23), the legislative debates regarding this wartime measure were premised on the existence of the Executive's authority to deny or revoke passports on national security grounds.[3] Indeed, as we pointed out in the petition (see Pet. 14-15), the passport control legislation enacted in 1918 would have been largely ineffectual without such authority over the issuance of

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[2]Moreover, since the Secretary's claim of authority is based on the broad language of the Passport Act of 1926, 22 U.S.C. 211a, and not merely on the Executive's inherent authority, respondent's reliance (Br. in Opp. 20) on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), is misplaced.

[3]Respondent states that Representative Flood, the sponsor of the 1918 legislation, "pointed out that the Secretary of State was not then authorized to revoke passports on national security grounds" and "specifically noted that the national security revocation authority claimed at that time was contrary to law, and could not be upheld" (Br. in Opp. 22 & n.8, 25 n.10, citing 56 Cong. Rec. 6066-6067 (1918)). The floor debate cited by respondent does not support these claims. Rather, Rep. Flood stated only that Congress had not required an American citizen to have a passport as a prerequisite for entering or leaving the country and that, as a result, the government's rules and regulations regarding travel without a passport were inadequate and possibly invalid. Rep. Flood did not suggest that the Secretary lacked power to deny or revoke passports on appropriate grounds. See 56 Cong. Rec. 6066-6067 (1918).

passports. And any doubt on this point was eliminated eight years later, when Congress broadly provided that "[t]he Secretary of State may grant and issue passports * * * under such rules as the President shall designate and prescribe for and on behalf of the United States * * *." Passport Act of 1926, 22 U.S.C. 211a.

Similarly, the Executive's attempt following the adverse decision in *Kent* to codify its authority in this area[4] does not demonstrate that the Executive previously lacked power to revoke passports for national security and foreign policy reasons. It is well settled that the Executive does not "admit[] that it is acting upon a wrong construction by seeking ratification from Congress." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950). See also *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-611 (1966). That principle is particularly apposite here. Notwithstanding respondent's contrary assertion (Br. in Opp. 20-21 n.7), the officials who have testified before Congress regarding the government's passport authority have uniformly indicated that the Executive has the authority to revoke passports on national security and foreign policy grounds.[5] Furthermore, just as Congress failed to act on

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[4]See S. 4110, 85th Cong., 2d Sess. (1958); Pet. App. 12a n.4. The legislative debate regarding this proposal focussed primarily on overruling *Kent* and permitting the Secretary to deny passports to communists. In these circumstances, there is no adverse inference regarding the Executive's authority in the area of national security. Cf. *Diamond* v. *Chakrabarty*, No. 79-136 (June 16, 1980), slip op. 10.

[5]For example, the State Department's Legal Adviser testified in 1958 that the authority to revoke passports on national security and foreign policy grounds is "a constitutional correlative of power to conduct foreign relations and to maintain the security of the United States * * *" and was "not in any way affected by the Supreme Court decision" in *Kent*. *Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist*

an administration proposal to codify its powers,[6] so too Congress declined subsequent to *Kent* to enact proposed legislation that would have severely limited the President's authority regarding the revocation of passports on foreign policy and national security grounds.[7] See, *e.g.*, H.R. 13652, 85th Cong., 2d Sess. (1958); S. 806 and S. 2095, 86th Cong., 1st Sess. (1959); *Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs*, 85th Cong., 2d Sess. 94-97 (1958); *Passport Legislation: Hearing on S. 806, S. 1973, S. 2287 and S. 2315 Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. 3-6 (1959).

Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs, 85th Cong., 2d Sess. 7 (1958). See, *e.g.*, *Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before the Senate Comm. on Foreign Relations*, 85th Cong., 2d Sess. 23 (1958); *Passport Legislation: Hearing on S. 806, S. 1973, S. 2287 and S. 2315 Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. 58, 62 (1959); *Providing Standards for the Issuance of Passports and for Other Purposes: Hearings on H.R. 9069 Before the House Comm. on Foreign Affairs*, 86th Cong., 1st Sess. 8, 178 (1959). See also *Proposed Travel Controls: Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 72 (1966) (Acting Administrator of the State Department Bureau of Security and Consular Affairs testified that in accordance with prior practice "we are working under a reguiation which says that whenever we believe it is in the national interest to deny or revoke a passport we have the authority to deny or revoke it").

[6]See note 4, *supra*. See also H.R. 14895, 89th Cong., 2d Sess. (1966).

[7]Respondent suggests (Br. in Opp. 28) that Congress is currently considering legislation that would resolve the statutory questions in this area. But S. 2216, 96th Cong., 2d Sess. (1980), and H.R. 5615, 96th Cong., 2d Sess. (1980), solely concern criminal prosecutions for unauthorized identification of covert intelligence agents and sources. This proposed legislation does not address the important passport control issue posed by this case.

For these reasons and the reasons stated in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. McCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09

No. 80-83

In the Supreme Court of the United States

OCTOBER TERM, 1980

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PETITIONER

v.

PHILIP AGEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR THE PETITIONER

QUESTION PRESENTED

Whether the President, acting through the Secretary of State, has authority to revoke the passport of an American citizen whose international travel activities have caused and will continue to cause serious damage to the national security and foreign policy of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-91a) is reported at 629 F.2d 80. The opinion of the district court (Pet. App. 92a-99a) is reported at 483 F. Supp. 729. The administrative decision revoking respondent's passport (Pet. App. 119a-124a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 100a-101a) was entered on June 27, 1980. The petition for a writ of certiorari was filed on July 18, 1980, and was granted on October 6, 1980 (J.A. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATUTE AND REGULATIONS INVOLVED

8 U.S.C. (Supp. II) 1185(b) provides:

> Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

22 U.S.C. (& Supp. II) 211a provides:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United

States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

22 C.F.R. 51.70(b) provides:

A passport may be refused in any case in which:

* * * * *

(4) The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States

* * *

22 C.F.R. 51.71 provides:

A passport may be revoked, restricted or limited where:

(a) The national would not be entitled to issuance of a new passport under 51.70 * * *.

STATEMENT

1. Between 1957 and 1968, respondent, an American citizen, held a position of trust with the Central Intelligence Agency (Pet. App. 2a, 18a, 105a-106a, 113a-114a).[1] Upon entering on duty

[1] Respondent waived his right to an administrative hearing in this case and, in light of respondent's express concession that his international travel activities have caused and will

with the CIA, respondent pledged not to discuss or publish, without prior approval, "any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment * * *" (*Id.* at 18a, 106a). See *Agee* v. *CIA*, No. 79-2788 (D.D.C. Oct. 2, 1980) (reprinted at J.A. 39-45). See generally *Snepp* v. *United States*, 444 U.S. 507 (1980). During his tenure with the CIA, respondent received training in CIA clandestine operations, including the methodologies employed to provide cover for CIA employees and sources. He also served in undercover CIA assignments abroad and became personally acquainted with numerous other undercover CIA employees, many of whom are still active and whose association with the CIA has never been officially acknowledged (Pet. App. at 105a-106a, 113a-114a).

In 1974, respondent publicly announced a campaign to disrupt and destroy the CIA.[2] Since that time,

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continue to cause serious damage to the nation's security and foreign policy (see pages 5-6, *infra*), no evidentiary hearing was held in the district court. The statement of facts is thus derived from respondent's concessions in the district court and the essentially undisputed affidavits (but see note 5, *infra*) submitted by the government in the district court in support of its motion for summary judgment (Pet. App. 102a-103a) and its applications for a stay pending appeal (*id.* at 105a-127a).

[2] On October 3, 1974, respondent issued the following press release in London (Pet. App. 18a-19a):

> Today, I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating;

respondent, who currently resides in the Federal Republic of Germany, has traveled abroad extensively, purporting to identify individuals within specific countries as CIA agents, employees, or sources. As respondent acknowledges (Pet. App. 17a-20a, 29a, 94a, 107a-112a), his activities and allegations have endangered the safety of many employees of the United States, whether or not they are connected to the CIA, and have caused serious damage to the national security and foreign policy of the United States. In particular, respondent's allegations about CIA operations are designed to force the expulsion of American employees from foreign countries and constitute a serious threat to the lives and safety of such employees (Pet. App. 19a-20a, 24a, 102a-103a, 107a, 111a-112a, 113a, 118a).[3]

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secondly, to seek within the United States to have the CIA abolished.

This effort to identify CIA people in foreign countries has been going on for sometime * * *. [Today's] list was compiled by a small group of Mexican comrades whom I trained to follow the comings and goings of CIA people before I left Mexico City.

Similar lists of CIA people in other countries are already being compiled and will be announced when appropriate. We invite participation in this campaign from all those who strive for social justice and national dignity.

[3] For example, on July 2, 1980, Louis Wolf, co-author with respondent of *Dirty Work: The CIA in Western Europe* (1978), held a press conference in Kingston, Jamaica, and named 15 persons as CIA agents in that country. The names and home addresses of these individuals were thereafter published in the local media. Within one week of Wolf's publicized announcement, two of the homes of the named individuals were subjected to violent, armed attacks (Pet. App. 125a-127a).

International travel has been and continues to be essential to respondent's avowed campaign against the CIA. His ability to travel abroad greatly enhances his potential to disrupt and damage American foreign policy and national security interests. Respondent is thus able to collect information that he needs to expose alleged CIA operations and employees; to find, recruit, and train individuals willing to assist in carrying out his program in various countries; to make personal contact with extremist groups; and to receive the type of intense local media coverage that he uses to incite hostile foreign groups to take action against American interests and personnel (Pet. App. 107a-112a, 113a-118a). See also note 3, *supra*.[4]

Recent events have further underscored the potential, if not actual, consequences of respondent's international travel activities. Citizens of various foreign countries, particularly Islamic nations, have demonstrated an increasing sensitivity to allegations that the United States has conducted or is conducting intelligence operations within their borders (Pet. App. 102a). Indeed, suspicions of CIA activity within Iran may have contributed to the anti-American feelings that led to the forcible takeover of the United States Embassy in Tehran in November 1979 and the continued imprisonment of more than 50 hostages by Iranian militants (*id.* at 21a-23a, 102a). Shortly after the embassy takeover, it was reported that respondent had been invited to travel to Iran to participate in a tribunal concerning the American hostages (*id.* at 103a, 116a-117a). Moreover, re-

[4] From time to time, various foreign governments, including Great Britain, France, Germany and Holland, have either deported respondent or refused him entry for security reasons (Pet. App. 18a).

spondent himself suggested that the Iranian militants should exchange the hostages for records of CIA intelligence operations in Iran, and he offered to assist the militants in analyzing any CIA documents that come into their possession (*id.* at 117a).[5]

Based on respondent's activities and in light of then-recent events in Iran, Pakistan, and Libya, the Secretary of State revoked respondent's passport on December 23, 1979 (Pet. App. 2a, 23a, 119a-124a). The letter revoking the passport stated that the Secretary's action was authorized by 22 C.F.R. 51.70 (b)(4) and 51.71(a), which provide that the Secretary of State may revoke a citizen's passport if his "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." The letter to respondent further explained (Pet. App. 120a):

> Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have

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[5] With the one clarification described below, the affidavits filed by respondent in the district court and the court of appeals do not deny the facts stated in the affidavits submitted by the government in the courts below. Following revocation of his passport, respondent did state that he has no present intent to go to Iran while American hostages are still being held in that country. But respondent gave no assurances as to his possible future actions or intentions. Nor has respondent denied that he suggested that the militants exchange the hostages for CIA documents about Iran and that he offered to assist the militants in analyzing such documents. Furthermore, respondent does not deny that he is engaged in a campaign to expose clandestine CIA activities and undercover personnel and that his ability to travel internationally facilitates this campaign in the various ways detailed in the text.

> travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

The State Department also informed respondent of his right to a hearing under 22 C.F.R. 51.80 through 51.105 and offered to hold an expedited hearing in West Germany (Pet. App. 120a, 123a-124a).

2. Respondent waived his right to an administrative hearing and instead filed suit in the United States District Court for the District of Columbia (Pet. App. 93a). Respondent attacked the revocation of his passport on both statutory and constitutional grounds [6] and sought declaratory and injunctive relief from the Secretary's action. Both sides moved for summary judgment. For purposes of the summary judgment motions, respondent admitted that the allegations contained in the letter of revocation are true. That is, respondent expressly conceded that his "activities * * * have caused serious damage to the national security and foreign policy of the United States" and that his "stated intention to continue such activities threatens additional damage of the same kind" (*id.* at 4a, 94a, 120a).

On January 28, 1980, the district court declared 22 C.F.R. 51.70(b)(4) invalid and ordered the Sec-

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[6] In particular, respondent claimed that the Secretary's regulations were not authorized by Congress, that the Secretary could not revoke his passport without a prior hearing, and that the revocation violated his First and Fifth Amendment rights (Pet. App. 93a-94a).

retary to restore respondent's passport (Pet. App. 99a). The court observed that the right to travel internationally is constitutionally protected and that the Secretary may therefore revoke the passport of an American citizen only if "he acts pursuant to an explicit [congressional] delegation or * * * he has followed 'sufficiently substantial and consistent' administrative practice to warrant the implied approval of Congress" (*id.* at 95a, quoting *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965)). The court concluded that the Secretary failed to establish such a delegation or a settled administrative practice in the area of foreign affairs or national security, and it accordingly declared that the regulation had been promulgated without statutory authority (Pet. App. 95a-99a).[7]

3. On appeal, a divided panel of the court of appeals affirmed (Pet. App. 1a-91a). After reviewing this Court's decisions in *Kent* v. *Dulles*, 357 U.S. 116 (1958), and *Zemel* v. *Rusk*, *supra*, the court of appeals agreed with the district court that the Secretary's regulations are valid only if "Congress has authorized 22 C.F.R. § 51.70(b)(4) either by an express delegation or by a 'sufficiently substantial and consistent' administrative practice to warrant finding the implied approval of Congress" (Pet. App. 11a). The court of appeals held that the Passport Act of 1926, 22 U.S.C. 211a, does not explicitly authorize the revocation of a passport on national security or foreign policy grounds (Pet. App. 11a-13a). The court also concluded that the Executive's past administrative practice of denying and revoking passports

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[7] In view of this disposition, the district court did not address respondent's constitutional claims (Pet. App. 98a-99a).

to protect this country's national security and foreign policy interests was too insubstantial to "demonstrat[e] implied congressional authorization for the challenged regulation" (*id.* at 14a).[8] The court further observed that the Executive has authority to revoke respondent's passport if he were charged with a crime, but that no such formal allegation had been made (*id.* at 16a). The court therefore held the Secretary's regulations invalid, noting that "[w]e are bound by the law as we find it" (*ibid.*).

Judge MacKinnon dissented (Pet. App. 17a-91a), asserting that "[n]o United States Congress would ever intend to require a President to issue a passport to one with [respondent's] record and intentions" (*id.* at 17a). In a lengthy opinion, Judge MacKinnon traced the history of the Secretary's statutory authority and administrative practice regarding the denial and revocation of passports on national security and foreign policy grounds (*id.* at 30a-54a, 64a-68a). Judge MacKinnon concluded that, since at least 1856, the Secretary of State, in peacetime as well as war, had repeatedly denied and revoked passports on foreign policy and national security grounds and that Congress was fully aware of this consistent administrative practice (*id.* at 43a-52a). This historical record, in Judge MacKinnon's view, clearly constitutes a " 'sufficiently substantial and consistent administrative practice to warrant the implied approval of Congress.' *Zemel* v. *Rusk*, 381 U.S. at 12" (Pet. App. 52a).

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[8] The court explained that the Executive's authority "to restrict or condition the issuance of passports during time of war or national emergency [was] inapposite and unpersuasive on the issue of implicit authority to invoke national security or foreign policy considerations during peacetime" (Pet. App. 15a).

In addition, the dissenting opinion pointed out that in *Zemel* v. *Rusk*, *supra*, the Court upheld a blanket denial of passports to an entire geographical area on national security and foreign policy grounds and that (Pet. App. 34a-35a; emphasis in original):

> [t]he greater power to deny passports to all citizens for a limited area on such grounds necessarily includes the lesser power to deny a passport to an individual citizen *on the same grounds* where it is *conceded* that his *worldwide activities* have caused serious damage to our national security and foreign policy, and that his stated intention to continue such activities was "likely to cause" additional damage of the same character.

Finally, Judge MacKinnon distinguished *Kent* v. *Dulles*, *supra*, on which the majority had principally relied, on the ground that *Kent* concerned the Secretary's decision to deny passports merely because of the applicants' beliefs and ideology. Here, by contrast, respondent's *activities* abroad have caused and will continue to cause serious damage to the national security and foreign policy of the United States (Pet. App. 56a-57a) and involve arguably illegal conduct (*id.* at 56a-63a, 72a-91a).

SUMMARY OF ARGUMENT

I.

The court of appeals held that the Executive is without authority to revoke respondent's passport even though respondent concedes that his international travels are causing serious harm to the foreign policy and national security of the United States. The Passport Act of 1926 provides, however, that the "Secre-

tary of State *may* grant and issue passports * * * under such rules as the President shall designate and prescribe for and on behalf of the United States * * *." 22 U.S.C. 211a (emphasis supplied). The Act thus vests broad discretion in the Executive over the issuance and denial of passports. Moreover, although Congress has expressly limited the Secretary's discretion with regard to some kinds of passport restrictions, there is no such restriction for revocations predicated on foreign policy or national security considerations. The court of appeals' narrow construction of the Act is accordingly unwarranted.

Indeed, this Court has previously concluded that the sweeping language of the Passport Act empowers the Secretary to protect the national security and foreign policy of the United States. In *Zemel* v. *Rusk*, 381 U.S. 1, 8 (1965), the Court held that the "language [of the Act] is surely broad enough to authorize" the area restrictions that the Secretary had imposed on all passports in light of then recent international events. *Zemel* also makes clear that the Court's earlier decision in *Kent* v. *Dulles*, 357 U.S. 116 (1958), affords respondent no support. As the Court explained, "the issue * * * in *Kent* was whether a citizen could be denied a passport because of his political belief or associations." 381 U.S. at 13. Here, by contrast, respondent's passport unquestionably was revoked for reasons of foreign policy and national security based on his past and threatened future actions, not because of respondent's ideological beliefs or associations. Hence, *Zemel* rather than *Kent* suggests the correct result in this case.

In any event, the history of passport control in the United States overwhelmingly demonstrates that the Secretary may revoke a citizen's passport to protect

the nation's security and foreign policy. In fact, the revocation of respondent's passport is consistent with two hundred years of unequivocal and unbroken administrative practice. Prior to 1856, the Secretary exercised broad discretion over the denial and revocation of passports as a matter of the Executive's inherent authority to conduct foreign affairs and to ensure the country's safety. Both this Court and Congress approved that practice. In 1856, Congress enacted the first Passport Act in order to make clear that only the Secretary of State had jurisdiction to issue and deny passports. In accordance with the broad language of that statute and Congress' evident intent, the Secretary continued during this period to revoke and deny passports on national security and foreign policy grounds. Moreover, in enacting a travel control provision in 1918, Congress evidenced its agreement with, and approval of, the Secretary's longstanding construction of the Act.

In 1926, Congress reenacted the Passport Act and once again indicated its understanding of the Secretary's broad powers in this area. Under the current Act, the Secretary has continued to deny and revoke passports in order to protect the nation's defense and foreign relations. That administrative interpretation is entitled to particular deference, because Congress has been informed of the Secretary's position on numerous occasions and, although it has legislated with regard to passport control in 1941, 1952, and 1978, it has not sought to limit the Secretary's discretion regarding persons such as respondent. Indeed, in 1978, when Congress reconsidered and amended both the travel control provision and the Passport Act itself, it confirmed that the Executive may "control the departure of U.S. citizens to foreign countries

when such travel is inconsistent with a greater government interest." S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978).

In ignoring this historical background and interpreting the Passport Act grudgingly, the court of appeals' decision has impermissibly interfered with the Executive's ability to carry out its constitutional duties in the fields of foreign affairs and national security. The passport itself is an instrument of foreign policy, and the power to deny a passport to someone such as respondent may be critical to the nation's defense or foreign relations. Furthermore, where, as here, the Executive acts pursuant to both a legislative grant of broad authority regarding foreign affairs and its own inherent power in this area, the courts "should hesitate long before limiting or embarrassing such powers." *MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915). In sum, we submit that it is inconceivable that Congress intended to compel the Secretary to issue a passport to a person such as respondent, whose international travels have caused and will continue to cause serious damage to the vital interests of the United States.

II.

Respondent's constitutional claims, which were not addressed by the courts below, are plainly insubstantial. Although the right to travel abroad is "an aspect of the 'liberty' protected by the Due Process Clause," it is subject to reasonable governmental regulation. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170, 176-177 (1978). Here, the regulation in question satisfies due process, because it is directly related to the compelling governmental interests in protecting national security and foreign policy. See *Zemel* v.

Rusk, supra, 381 U.S. at 13-16. In addition, revocation of respondent's passport is justified by the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980).

Similarly, revocation of respondent's passport does not run afoul of the First Amendment. The regulation challenged here is directed on its face at the *conduct* of American citizens abroad and not protected speech. Moreover, to the extent that the regulation inhibits an individual's ability to communicate, it is well settled that the government may reasonably abridge the right of free speech to protect the national security. Finally, the regulation is not overbroad, because it is neutrally directed at proscribable conduct rather than speech and because it has been narrowly construed and applied. See, *e.g.*, *Parker* v. *Levy*, 417 U.S. 733, 760-761 (1974); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613-616 (1973).

ARGUMENT

This case presents the question whether the Executive may deny or revoke a passport to protect the foreign policy and national security of the United States. Although respondent concedes that his international travels have caused and will continue to cause serious damage to the nation's security and foreign relations, the court of appeals concluded that the Passport Act of 1926, 22 U.S.C. 211a, does not authorize the President, acting through the Secretary of State, to revoke respondent's passport. In the court of appeals' view (Pet. App. 11a-12a, 16a),

unless respondent has been indicted, the Executive is powerless to restrict respondent's travels abroad no matter how grave the danger to this country's security and no matter how great the interference with the President's conduct of foreign policy. Particularly since a passport is an instrument of foreign policy (see pages 22-23, 48-49, *infra*), that conclusion cannot be reconciled with the broad language of the Passport Act and the lengthy and consistent history of passport control based on foreign policy and national security grounds. See Point I, *infra*. Moreover, as we show in Point II, *infra*, respondent's constitutional claims regarding the revocation of his passport are insubstantial.[9]

I

THE PASSPORT ACT OF 1926 AUTHORIZES THE EXECUTIVE TO REVOKE A CITIZEN'S PASSPORT IN ORDER TO PROTECT THE NATIONAL SECURITY AND FOREIGN POLICY OF THE UNITED STATES

A. The Executive Has Broad Authority Under The Passport Act Regarding The Denial And Revocation Of Passports

The Passport Act of 1926 provides that the "Secretary of State *may* grant and issue passports * * *

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[9] Neither court below reached respondent's constitutional arguments, and this Court ordinarily would not address these questions in the first instance. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Combs* v. *United States*, 408 U.S. 224, 227 n.4 (1972). Because respondent has indicated that he will raise these issues as an alternative ground for affirmance (see Br. in Opp. 27 n.12) and because respondent's constitutional claims might otherwise affect the Court's construction of the Act (compare *Zemel* v. *Rusk*, 381 U.S. 1 (1965), with *Kent* v. *Dulles*, 357 U.S. 116 (1958)), we discuss these claims in Point II of our brief.

under such rules as the President shall designate and prescribe for and on behalf of the United States * * *." 22 U.S.C. 211a (emphasis supplied).[10] Pursuant to this broad authority, the Secretary of State has promulgated regulations concerning the denial and revocation of passports on national security and foreign policy grounds. 22 C.F.R. 51.70(b)(4) states that a passport will not be issued to an applicant if "[t]he Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."[11] 22 C.F.R. 51.71, in turn, authorizes the Secretary to revoke a passport in any circumstance in which the national would not be entitled to issuance of a new passport.[12]

Notwithstanding the expansive sweep of the Passport Act, the court of appeals has concluded that Congress intended to compel the Secretary to issue a passport to a citizen whose activities abroad would cause serious damage to the nation's security and for-

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[10] By Exec. Order No. 11295, 31 Fed. Reg. 10603 (1966), reprinted in 22 U.S.C. 211a note, the President has delegated to the Secretary of State the authority to designate and prescribe rules governing passports. 3 U.S.C. 301 permits such delegation.

[11] The current version of 22 C.F.R. 51.70(b)(4) was promulgated in 1968. 33 Fed. Reg. 5681 (1968). Since the earliest days of this country's history, the Executive has from time to time issued similar directives and has invoked the authority to deny passports on national security and foreign policy grounds. See pages 22-47, *infra*.

[12] In addition to the grounds at issue here, 22 C.F.R. 51.70 authorizes the Secretary to deny passports to fugitives, parole violators, incompetent persons, and individuals who have failed to pay repatriation loans. See also *Kent* v. *Dulles*, 357 U.S. 116, 127 (1958).

eign policy interests. Nothing in the broad language of Section 211a supports that remarkable conclusion. To the contrary, the Act clearly vests broad discretion in both the Secretary and the President regarding the issuance of passports. See *Andrus* v. *Idaho*, 445 U.S. 715, 726-727 (1980). Furthermore, as amended in 1978, Section 211a expressly limits the Secretary's authority solely with regard to area restrictions.[13] No such limitation appears with regard to the Secretary's power to deny passports to persons, such as respondent, whose travels are harming the national security and foreign policy of this country, and none should be lightly implied. See, *e.g.*, *Diamond* v. *Chakrabarty*, No. 79-136 (June 16, 1980), slip op. 4; *Andrus* v. *Glover Construction Co.*, No. 79-48 (May 27, 1980), slip op. 9; *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

This Court has previously recognized that the unrestricted language of the Passport Act gives the Executive substantial discretion with regard to the issuance and denial of passports. Thus, in *Zemel* v. *Rusk*, 381 U.S. 1 (1965), the Court held that Section

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[13] An area restriction is a limitation on the general public's right to travel to a particular country or geographical area. The Secretary's power to impose such restrictions was upheld by this Court in *Zemel* v. *Rusk*, 381 U.S. 1 (1965). In 1978, however, Congress amended Section 211a to permit the imposition of area restrictions only when the foreign country is at war with the United States or involved in armed hostilities, or "where [the locality presents] imminent danger to the public health or the physical safety of the United States travelers." Pub. L. No. 95-426, Title I, Section 124, 92 Stat. 971, codified at 22 U.S.C. (Supp. II) 211a. See pages 46-47, *infra*.

211a "embodies a grant of authority to the Executive to refuse to validate the passports of United States citizens for travel to [restricted areas]." 381 U.S. at 7. The Court observed that the Act's "language is surely broad enough to authorize area restrictions, and there is no legislative history indicating an intent to exclude such restrictions from the grant of authority." *Id.* at 8. Likewise, it is beyond dispute that Section 211a "is surely broad enough to authorize" the denial and revocation of respondent's passport pursuant to 22 C.F.R. 51.70(b)(4) and 51.71. See also *Perkins* v. *Elg*, 307 U.S. 325, 350 (1939); *Worthy* v. *Herter*, 270 F.2d 905, 912 (D.C. Cir.), cert. denied, 361 U.S. 918 (1959); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1144-1145 n.50 (1972). Indeed, here, as in *Zemel*, the Secretary's imposition of travel restrictions on " 'persons whose travel may be regarded as [not] being in the best interest of the United States' " (381 U.S. at 3) is predicated on "the weightiest considerations of national security" "and foreign policy" (*id.* at 16, 13).

Kent v. *Dulles*, 357 U.S. 116 (1958), is not to the contrary. *Kent* did not concern the exercise of the Executive's authority to revoke a passport for reasons of foreign policy or national security. In fact, the passport applicants in *Kent* had not engaged in any "plainly harmful conduct" (*id.* at 126) and their travels abroad posed no " 'imminent danger to the public safety' " (*id.* at 128, quoting *Korematsu* v. *United States*, 323 U.S. 214, 218 (1944)). Rather, as the Court explained in *Zemel*, "the issue * * * in *Kent* was whether a citizen could be denied a passport

because of his political belief or associations." 381 U.S. at 13.[14]

Although the Court acknowledged in *Kent* that the Passport Act codified the Secretary's discretionary power regarding passports "in broad terms" (357 U.S. at 127), it nonetheless construed the statute to avoid the obviously difficult constitutional questions raised by the Secretary's actions in that case. See *id.* at 126-130.[15] Here, however, there is no similar justification for restricting the plain meaning of Section 211a. Because respondent has been denied a passport on national security and foreign policy grounds rather than ideological ones, his constitutional claims are insubstantial. See Point II, *infra; Huddleston* v. *United States*, 415 U.S. 814, 833 (1974). Moreover, as we now demonstrate, the history of passport control shows that, in contrast to the situation in *Kent*,[16] Congress contemplated that the Executive would revoke the passports of persons, such as respondent, whose travels abroad are inimical to the nation's security and foreign policy.

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[14] For the same reasons, the decision in *Dayton* v. *Dulles*, 357 U.S. 144 (1958), is inapposite.

[15] In *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), the Court subsequently held that the Fifth Amendment precludes Congress from depriving citizens of their passports merely because of their membership in the Communist Party.

[16] The Court concluded in *Kent* that the legislative history did not evidence a congressional intent to deny passports simply on the basis of the applicant's Communist beliefs, and that the administrative practice regarding Communists was "scattered rulings and not consistently of one pattern." 357 U.S. at 128.

B. The History Of Passport Control Demonstrates That The Executive Has The Authority To Deny Or Revoke The Passport Of A Citizen Whose Travels Abroad Are Causing Harm To The National Security And Foreign Policy Of The United States

The Court has often remarked that "a statute come[s] 'freighted with the meaning imparted to [it] by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a teacher that is not to be ignored.' " *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 545-546 (1978), quoting *Duparquet Co.* v. *Evans*, 297 U.S. 216, 221 (1936). See, *e.g.*, *Andrus* v. *Idaho*, *supra*, 445 U.S. at 727; *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980). As the decisions in both *Kent* and *Zemel* indicate, that observation has particular relevance to the construction of the Passport Act. See 357 U.S. at 120-125, 128; 381 U.S. at 8-12, 17-18.[17]

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[17] In *Zemel*, the Court stated that "the 1926 Act must take its content from history" (381 U.S. at 17-18) and suggested that the Act does not constitute an unconstitutional delegation so long as it is construed to "authorize[ ] only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice' " (*id.* at 18, quoting *Kent* v. *Dulles*, *supra*, 357 U.S. at 128). Because the history of passport control legislation demonstrates that Congress intended to permit the Secretary to deny passports to persons such as respondent, this case affords no occasion for the Court to reconsider this dictum in *Zemel*. We note, however, that the Court elsewhere "has recognized that, in the area of foreign policy, Congress may leave the President with wide discretion that otherwise might run afoul of the nondelegation doctrine." *Goldwater* v. *Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring). See, *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

Here, as in *Zemel*, both the historical administrative practice and the relevant legislative history strongly support the Secretary's position that passports may be revoked or denied to protect the nation's security and foreign policy. See Pet. App. 43a-52a, 64a-67a (MacKinnon, J., dissenting).

Because that history is both detailed and lengthy, we summarize at the outset the salient points. First, prior to the enactment of the original Passport Act in 1856, the Secretary, consistent with the view of both Congress and this Court, exercised broad discretion over the issuance and denial of passports as part of the Executive's constitutional responsibilities regarding foreign affairs and the national defense. In 1856, Congress codified the Executive's broad power in this regard, and during the next 70 years the Executive repeatedly, albeit judiciously, exercised its passport control authority on national security and foreign policy grounds. Then in 1918, Congress enacted a travel control statute that was predicated on the Secretary's authority to deny passports to citizens whose travels threatened the security and foreign policy of this country. Eight years later, Congress reenacted the Passport Act, and since that time, the Executive has continued to regulate passports on national security and foreign policy grounds.

Furthermore, as we show in Point I.C., *infra*, Congress must be deemed to have acquiesced in this 200-year old administrative practice. The Secretary has repeatedly informed Congress of its views on this matter and Congress has never acted to deprive the Secretary of the power to deny and revoke passports on national security and foreign policy grounds. Quite to the contrary, since 1926 Congress has on several occasions enacted and amended travel control legis-

lation whose efficacy is dependent in large measure on the Executive's broad passport control authority. In addition, Congress reconsidered and amended both the Passport Act and the related travel control provisions in 1978, and again evidenced its understanding of the Executive's broad powers in this area.

1. *The Early History*

For the first 80 years of this country's existence, Congress passed no law explicitly authorizing the Secretary of State to issue passports. Nonetheless, it was universally understood that passports are instruments of foreign policy and that in futherance of the Executive's constitutional duties regarding foreign affairs and national security (see United States Constitution Article II, Section 2, Clauses 1 and 2), the Secretary had broad discretion over the issuance and denial of passports. See, *e.g.*, 3 J. Moore, *International Law Digest* § 492, at 856-857; § 493, at 862-864; § 494; § 495, at 869-871; and § 512, at 919-920 (1906) (H.R. Doc. No. 551, 56th Cong., 2d Sess. (1906) (hereinafter "J. Moore"); Department of State, *The American Passport* 8-41, 82-87 (1898); 3 G. Hackworth, *Digest of International Law* § 261, 448 (1942) (hereinafter "G. Hackworth"); *Passports and the Right to Travel: A Study of Administrative Control of the Citizen*, 89th Cong., 2d Sess. 2-3 (Comm. Print 1966) ("Passports and the Right to Travel"); *The Right to Travel: Hearing Pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 59, 159-160 (1957); *Miller* v. *Sinjen*, 289 F. 388, 394-395 (8th Cir. 1923).[18] In *Urtetiqui*

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[18] The Secretary's exercise of this authority has its origins in the common law as well as the Constitution. It was well

v. *D'Arcy*, 34 U.S. (9 Pet.) 692 (1835), for example, this Court explained (*id.* at 699):

> There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary with him. * * * It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen * * *.

From time to time during this period, Congress likewise recognized that the Secretary wielded broad discretionary powers regarding the issuance and denial of passports, particularly in the areas of foreign policy and national security. Thus, although Congress did not deem it necessary expressly to authorize the Secretary to issue and deny passports, it did ratify several treaties and enact statutes premised on the Secretary's power to do so. See, *e.g.*, Conven-

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established that, notwithstanding the common law right to travel (see *Kent* v. *Dulles*, *supra*, 357 U.S. at 125), the Crown could prevent a citizen from traveling abroad in order to protect the national security. For example, even in times of peace, the King could require archers and others who possessed special knowledge regarding the nation's defense to remain in the country. See 1 W. Blackstone, *Commentaries* *265-266*; 10 W. Holdsworth, *A History of English Law* 390-392 (1938); *Passports and the Right to Travel*, *supra*, at 1-2.

tion with the Swiss Confederation, Nov. 25, 1850, art. IV, 11 Stat. 589-590 (requiring American citizens visiting Switzerland to have passports); Act of Apr. 30, 1790, ch. 9, Section 28, 1 Stat. 118 (prohibiting violation of federal passports and certificates of safe-conduct); Act of Feb. 28, 1803, ch. 9, Section 8, 2 Stat. 205 (prohibiting State Department representatives abroad from knowingly issuing passports to aliens); Act of Mar. 1, 1855, ch. 133, Section 12, 10 Stat. 624 (eliminating fees for passports).

In 1815, for example, Congress made it unlawful for any citizen or resident "to cross the frontier into any province or territory belonging to the enemy * * * without a passport first obtained from the Secretary of State, the Secretary of War, or other officer * * * authorized by the President of the United States, to grant same * * *." Act of Feb. 4, 1815, ch. 31, Section 10, 3 Stat. 199. Congress also prohibited citizens from entering enemy camps or boarding enemy vessels without such a passport. See 3 Stat. 199-200. These measures were, of course, designed to protect the national security. In particular, Congress sought to preclude citizens from "smuggling * * * on the Northern frontier * * * in the course of which the enemy obtains important intelligence * * * and * * * essential supplies." 28 Annals of Congress 758 (1814) (remarks of Rep. Eppes). See also *id.* at 758-760; J. Moore, *supra*, § 532, at 1015-1016. Because the ready availability of federal passports for all citizens would obviously have defeated the purpose of this passport measure, it is apparent that as early as 1815 Congress contemplated that the Secretary could and would deny passports to persons whose travels across the border would threaten the national security of the United States.

2. *The Passport Act of 1856*

a. *The Statute.* Congress enacted the first Passport Act in 1856. Act of Aug. 18, 1856, ch. 127, Section 23, 11 Stat. 60-61. Much like the current Passport Act, this statute provided that the Secretary of State "shall be authorized to grant and issue passports * * * under such rules as the President shall designate and prescribe for and on behalf of the United States * * *." 11 Stat. 60.[19] Particularly in light of the well settled tradition regarding the sovereign's power to deny and revoke passports on national security and foreign policy grounds, " 'Congress would have specifically so provided had it wished to abolish' " that discretionary authority. See *Owen* v. *City of Independence, supra,* 445 U.S. at 637, quoting *Pierson* v. *Ray,* 386 U.S. 547, 555 (1967). See also, *e.g., Gooding* v. *United States,* 416 U.S. 430, 457-458 (1974); *Panama R.R.* v. *Johnson,* 264 U.S. 375, 384 (1924). To the contrary, however, the 1856 enactment on its face broadly codified the Executive's authority in this area.

The disruptive practice of many state and local officials of issuing passports and similar certificates gave rise to the 1856 statute. Congress sought to preclude such non-federal officials from interfering in the inherently federal function of passport control and thereby to centralize passport authority in the Executive Branch. See *Kent* v. *Dulles, supra,* 357 U.S. at 123; J. Moore, *supra,* § 493, at 862-864; *The*

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[19] In 1874, Congress amended the Act to provide that "[t]he Secretary of State may grant and issue passports * * * under such rules as the President shall designate and prescribe * * *." Rev. Stat. 4075. We are unaware of any relevant legislative history regarding this change in language. See also Act of May 30, 1866, ch. 102, 14 Stat. 54.

American Passport, supra, at 36-41; 8 M. Whiteman, *Digest of International Law* 225 (1967); 9 Op. Att'y Gen. 350, 352 (1859). There is absolutely no indication that at the same time Congress also intended to limit the Executive's existing power to refuse to issue passports to persons whose travels threatened the national security or foreign policy of the United States. Rather, Senator Mason, the sponsor of the Act, stated that "it was the intention of the bill to leave, all that pertains to the diplomatic service of the country * * * exclusively to the Executive, where we consider the Constitution has placed it." Cong. Globe, 34th Cong., 1st Sess. 1798 (1856). See also *id.* at 1797, 1798-1799; S. Rep. No. 209, 34th Cong., 1st Sess. 1 (1856).

b. *Executive implementation.* The Executive, and in particular the Secretary, immediately construed the original Passport Act as preserving its authority to deny passports on national security and foreign policy grounds. Thus, in 1861, Secretary of State Seward issued orders prohibiting all persons from going abroad, entering this country, or crossing into enemy territory unless they had first obtained a passport. See *The American Passport, supra*, at 49-54; J. Moore, *supra*, at 1015-1021. Citzens subject to military service (unless bonded) and persons "on errands hostile and injurious to the peace of the country and dangerous to the Union" were not entitled to a passport. *Id.* at 920. As a result of these regulations, the Executive repeatedly denied passports on national security grounds during the Civil War period. See *id.* at 1017-1020.

Furthermore, the Executive's unequivocal and consistent understanding that it could deny passports to protect the nation's vital interests was not limited

to wartime circumstances.[20] In 1901, Attorney General Knox, confirming an earlier opinion rendered by Attorney General Hoar (13 Op. Att'y Gen. 89, 92 (1869)), concluded that "a passport * * * may, in [the Secretary's] discretion, be granted or withheld." 23 Op. Att'y Gen. 509, 511 (1901). The Attorney General explained (*ibid.*);

> Substantial reasons exist for the use by Congress of the word "may" in connection with authority to issue passports. Circumstances are conceivable which would make it most inexpedient for the public interests for this country to grant a passport to a citizen of the United States. For example, if * * * an avowed anarchist * * * were to make such application, the public interests might require that his application be denied.

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[20] The court of appeals suggested (Pet. App. 15a) that the practice of revoking passports in wartime is "inappropriate and unpersuasive on the issue of implicit authority to invoke national security or foreign policy considerations during peacetime." We disagree. To be sure, the exigencies of wartime may justify limitations on personal freedom not permissible in peacetime. See, *e.g.*, *Korematsu* v. *United States*, 323 U.S. 214 (1944). But the issue in this case is whether the Passport Act of 1926 authorizes the Secretary to revoke a passport to protect the national security or foreign policy of the United States, and nothing in the language or legislative history of the Act suggests that the Secretary has greater discretion under the statute in wartime than in peacetime. Hence, in *Zemel*, this Court reviewed both peacetime and wartime practices in sustaining the peacetime practice challenged in that case. See 381 U.S. at 8-12. That the Secretary has perhaps invoked this power of revocation more often in wartime and other periods of national crisis is hardly surprising, since in those circumstances a citizen's travels abroad are more likely to trench upon foreign policy and national security concerns.

Similarly, in 1903, President Roosevelt promulgated a rule providing that "the Secretary of State has the right in his discretion to refuse to issue a passport, and will exercise this right towards anyone who, he has reason to believe, desires a passport to further an unlawful or improper purpose." J. Moore, *supra*, at 902; F. Van Dyne, *Citizenship of the United States* 257 (1904). See also Exec. Order No. 654 (June 13, 1907); Exec. Order No. 2119-A (Jan. 12, 1915); Exec. Order No. 2362-A (Apr. 17, 1916); Exec. Order No. 2519-A (Jan. 24, 1917). See also H.R. Doc. No. 326, 59th Cong., 2d Sess. 3-4, 7, 14 (1906); J. Moore, *supra*, §§ 512, 521; *The Right To Travel: Hearing Pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess., Pt. 2, 343-350 (1957).

The Secretary's construction of the Passport Act was not simply of academic importance, but was in fact applied in practice to deny passports to persons whose travels threatened substantial harm to the country's foreign policy or national security.[21] Although there are no systematic records on passport refusals, numerous peacetime instances in which passports were denied on national security and foreign

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[21] The Court's analysis in *Zemel* makes clear that Executive Orders and State Department rules and regulations, as well as individual passport denials, are part of the historical administrative practice that Congress may be deemed to have adopted over the years. See 381 U.S. at 8-12, 18. In fact, because Congress is more likely to be aware of Department regulations rather than particular rulings and because many persons might be dissuaded from seeking a passport if they were aware of their ineligibility, it makes little sense to focus only on actual instances of passport denials. Here, of course, both the regulations and rulings are consistently of one pattern.

policy grounds are well documented.[22] For example, in 1906, the Secretary denied a passport to a citizen who had gone to China and become a notorious promoter of gambling and prostitution, thereby embarrassing this country's relations with China. The Solicitor of the Department of State explained this action as follows (G. Hackworth, *supra*, at 498-499):

> The Secretary of State does not pose as a censor of morals, but if the moral character of the applicant is such as seemingly to involve the public interest or to reflect upon the good name of the United States, no reason is seen why the Secretary should not exercise his discretion in withholding the passport.
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> * * * *
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> A passport is not merely evidence or prima facie evidence of citizenship. It is a request to a foreign government to permit the bearer of a passport "safely and freely to pass, and in case of need to give him or her all lawful aid and protection." In other words, the passport is a request for the good offices of the foreign government and in this respect is in a rough way equivalent to a letter of introduction.
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> It may well be that we may not care to give a letter of introduction and request good offices for a citizen of the United States whose conduct as evidenced by his past and present actions is likely to embarrass the United States. Such a case would seem to be a proper one for the

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[22] Because passport files are maintained by name rather than by category of applicant or reason for disposition, it is virtually impossible to compile comprehensive statistical data regarding passport denials on national security or foreign policy grounds.

Secretary to exercise his discretion and refuse the issue of a passport.

Moreover, in 1907, the Secretary declined to issue a new passport to Nelken Waldberg, an American citizen residing in Cairo, who "was engaged * * * in blackmailing projects, and *was disturbing or endeavoring to disturb the relations of this country with the representatives of foreign countries*" by libeling citizens and members of the diplomatic corps in Egypt. See G. Hackworth, *supra*, at 500-501 (emphasis supplied). See also C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1195 (1945); *The Right to Travel*, *supra*, at 167; Department of State, *Papers Relating to the Foreign Relations of the United States*, Pt. 2, 1076-1084 (1910). In connection with this episode, State Department officials reiterated the view that "the granting of a passport is a matter of discretion with the Secretary and not a matter of strict right," and that "[i]n the exercise of this discretion passports may be refused to persons * * * on high grounds of public policy." *Id.* at 1080-1083. Similarly, in 1917, the passport applications of several socialists were denied, because, contrary to American foreign policy interests and in apparent violation of the Logan Act, 18 U.S.C. 953, the applicants intended to participate in a quasi-official conference in Stockholm, Sweden. See E. Freund, *Administrative Powers Over Persons and Property: A Comparative Survey* 521 n.9 (1928). See also G. Hackworth, *supra*, at 504 (passport denied in 1921 for reasons of "international comity").

c. *1918 Travel Control Act.* In enacting the Travel Control Act in 1918, Congress confirmed that the Secretary, pursuant to his authority under the

original Passport Act, could revoke passports on national security and foreign policy grounds. Prior to the 1918 Act, no law required possession of a passport as a prerequisite to entering or leaving the United States, although, of course, the Secretary had broad discretion over the issuance of passports and such passports were often essential for safe travel abroad.[23] The 1918 Act provided that, upon Presidential wartime proclamation, "it shall, except as otherwise provided by the President * * *, be unlawful for any citizen * * * to depart from or enter * * * the United States unless he bears a valid passport." Act of May 22, 1918, ch. 81, Sections 1 and 2, 40 Stat. 559.

The 1918 travel control provision, which must be read in pari materia with the Passport Act (see, *e.g.*, *Roadway Express, Inc.* v. *Piper*, No. 79-701 (June 23, 1980), slip op. 7), was obviously designed to limit international travel by American citizens that was contrary to the public's overriding interest in national security. Because the 1918 Act does not authorize the Secretary to issue or deny passports, it would have failed in its purpose unless the Secretary had authority under the Passport Act to deny passports to persons such as respondent, whose travels abroad threatened the nation's security and foreign relations. In other words, if all citizens could obtain a passport for the asking, all could travel abroad regardless of the impact of their travels on national

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[23] See, *e.g.*, 56 Cong. Rec. 6029 (1918) (remarks of Rep. Flood). As explained above, Congress had previously imposed such travel control in 1815, but that law expired with the end of hostilities. See page 24, *supra*. Likewise, during the Civil War, the Executive had imposed a similar passport control requirement. See page 26, *supra*.

defense and foreign policy—a result clearly not intended by Congress.

The legislative history accompanying the 1918 Act reflects with clarity Congress' understanding on this point. Congress was primarily concerned with the possibility that "renegade Americans" might go abroad to "transfe[r] important military information." H.R. Rep. No. 485, 65th Cong., 2d Sess. 2 (1918). See 56 Cong. Rec. 6029-6030, 6067, 6195 (1918). Although such persons might not be prosecutable for a crime,[24] Congress plainly intended that the Department of State, which Congress expressly recognized was responsible for issuing passports, nonetheless would deny such persons the means to leave this country—that is, a passport. See H.R. Rep. No. 485, *supra*, at 2-3; 56 Cong. Rec. 6029-6031, 6063-6067 (1918). In sum, the purpose of the 1918 Act was "to give the executive departments of the Government power to control ingress to and egress from this country" (*id.* at 6029 (remarks of Rep. Flood)),[25] while preserving "the President['s] dis-

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[24] Congress specifically focused on the case "of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country * * *. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined." H.R. Rep. No. 485, *supra*, at 3.

[25] In his brief in opposition, respondent states that Representative Flood, the sponsor of the bill, "pointed out that the Secretary of State was not then authorized to revoke

cretion to say who shall or who shall not have passports" (*id.* at 6030 (remarks of Rep. Moore)).[26]

Following passage of the 1918 Act, the Executive proceeded to effectuate the legislative design by continuing the settled practice of denying passports to

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passports on national security grounds" and "specifically noted that the national security revocation authority claimed at that time was contrary to law, and could not be upheld" (Br. in Opp. 22 & n.8, 25 n.10, citing 56 Cong. Rec. 6066-6067 (1918)). The floor debate cited by respondent does not support these claims. Rather, Representative Flood stated only that Congress had not required an American citizen to have a passport as a prerequisite for entering or leaving the country and that, as a result, the Executive Branch rules and regulations regarding travel without a passport were inadequate and possibly invalid. See 56 Cong. Rec. 6066-6067 (1918).

Indeed, Representative Flood elsewhere explained that "the department issues some passports[, but] not all that are asked for" (56 Cong. Rec. 6031 (1918)), and that the Secretary should deny passports to "those whose loyalty is suspected, but there is not enough evidence to convict them in a court of justice" (*id.* at 6064). See also *id.* at 6063 (remarks of Rep. Huddleston) ("Now, a passport cannot be claimed by a citizen as a matter of right. Passports are granted only at the will of an administrative officer."); *id.* at 6246 (remarks of Sen. Townsend) (even before 1918 bill, "the administration * * * had been vested with discretionary power" regarding passports).

[26] In *Kent* v. *Dulles*, *supra*, the four dissenting Justices concluded that "[t]he legislative history of the 1918 Act sharply indicates that Congress meant the Secretary to deny passports to those whose travel abroad would be contrary to our national security." 357 U.S. at 132 (Clark, J., dissenting). The Court did not differ with that conclusion, but held only that there was no nexus between mere communistic beliefs and harm to national security. *Id.* at 128. Here, in contrast, respondent concedes that his international travels have caused and are causing substantial harm to the foreign policy and national security of the United States.

national security risks. See C. Hyde, *supra*, at 1196, 1204-1206. Indeed, the Presidential Proclamation triggering application of the Act prohibited issuance of a passport "unless it shall affirmatively appear that there are adequate reasons for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States." Presidential Proc. of Aug. 8, 1918, Section 1, 40 Stat. 1831. And implementing regulations required the Secretary of State to submit every passport application to various intelligence agencies "for such information as said respective intelligence services may have available upon the applicant and for such comments as they desire to make." Department of State, *Control of Foreign Travel* (1918) (confidential instructions issued for guidance of officials connected with the administration of the Act of May 22, 1918).

3. *The Passport Act of 1926*

Eight years later and while the 1918 Act was still in force,[27] Congress recodified the Executive's broad authority over the issuance and denial of passports. Act of July 3, 1926, ch. 772, 44 Stat. 887. Because the Passport Act of 1926 adopts in haec verba the pertinent language of the prior passport statute, Congress must be presumed to have adopted the statute's longstanding administrative construction as well—at least in the absence of any compelling evidence of contrary congressional intent. See, *e.g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275

[27] The Presidential Proclamation triggering the Act's application during World War I expired in 1921. See 41 Stat. 1359. The Act itself, however, continued to authorize travel control limitations in case of war.

(1973); *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 450 (1948); *National Lead Co.* v. *United States*, 252 U.S. 140, 146-147 (1920). That presumption is fully apposite here.

First, Congress had only recently been reminded of the Secretary's long held view of his discretionary powers regarding the denial of passports on national security and foreign policy grounds, and had only recently enacted legislation based on that understanding. See H.R. Rep. No. 485, *supra*, at 2-3; 56 Cong. Rec. 6029-6030, 6063-6067 (1918). See also *Foreign Service of the United States: Hearings Before the House Comm. on Foreign Affairs*, 68th Cong., 1st Sess. 200-201 (1924). Moreover, the legislative history accompanying the 1926 Act, albeit sparse, emphasizes that Congress intended to facilitate the Secretary's discharge of his passport duties "without any risk of disadvantage to the Government." S. Rep. No. 1177, 69th Cong., 1st Sess. 2 (1926); H.R. Rep. No. 1358, 69th Cong., 1st Sess. 2 (1926). Indeed, the legislative hearings on the Passport Act of 1926 show that Congress was aware of the Secretary's broad discretion to deny passports to ineligible persons and that the Act was not intended to change prior practice. See *Validity of Passports: Hearings on H.R. 11947 Before the House Comm. on Foreign Affairs*, 69th Cong., 1st Sess. 2, 5, 8, 10, 11, 15, 21, 32-33 (1926).

C. The Court Of Appeals Erroneously Set Aside The Secretary's Longstanding Administrative Construction Of The Passport Act Of 1926

It is axiomatic that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.' " *E.I. du Pont de Nemours & Co.* v.

Collins, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See, *e.g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980); *Zemel* v. *Rusk*, *supra*, 381 U.S. at 11. Consistent with the language of the Passport Act of 1926 and the 150 years of passport control history canvassed above, the Secretary has repeatedly and unequivocally construed the Act as authorizing passport revocations based on foreign policy and national security considerations. See pages 36-40, *infra*. The court of appeals should have deferred to this administrative interpretation, because, as we now demonstrate, Congress has been informed of the Secretary's policies on numerous occasions and has repeatedly indicated its concurrent views on this point in the course of amending both the 1918 Travel Control Act and the Passport Act itself. See, *e.g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 595-596 (1980); *Board of Education* v. *Harris*, 444 U.S. 130, 148-149 (1979).

1. *Post-1926 Administrative Practice*

Following passage of the 1926 Act, the Executive not surprisingly continued both to assert and to exercise the power to deny and to revoke passports on national security and foreign policy grounds.[28] In an opinion rendered barely more than one month after the reenactment of the Passport Act, the Solicitor of the Department of State reiterated the Department's position that issuance of a passport is a discretionary act and that "the public interests for this

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[28] Likewise, the Executive from time to time imposed area restrictions on some or all passports in light of national security and foreign policy considerations. See, *e.g.*, *Zemel* v. *Rusk*, *supra*, 381 U.S. at 8-12.

country" might require denial of a passport to particular individuals. G. Hackworth, *supra*, at 467-468. In addition, Presidents Coolidge, Hoover and Roosevelt issued Executive Orders directing the Secretary to require satisfactory evidence from each passport applicant as to the purpose of his visit abroad and to deny such application if either the purpose of the visit or the evidence produced was unsatisfactory. See Exec. Order No. 4800 (Jan. 3, 1928); Exec. Order No. 5860 (June 22, 1932); Exec. Order No. 7856, 3 Fed. Reg. 687 (1938); 6 Fed. Reg. 5821, 6069, 6349 (1941); 7 Fed. Reg. 2590, 3708 (1942).

Pursuant to these Executive Orders and his authority under the Passport Act, the Secretary consistently concluded that no passport should be issued to a person whose foreign travel "activities are proved inimical to the United States." G. Hackworth, *supra*, at 499. For example, the 1930 consular regulations directed that passport applications be denied if the "applicant intends to commit crime or otherwise to bring grave discredit on the United States as * * * a political adventurer desiring or intending to take part in the political or military affairs of a foreign government in ways which would be contrary to the policy or inimical to the welfare of the United States * * *." *Id* at 501. Similarly, the Passport Division Office Instructions of July 30, 1937, Department of State, *Abstract of Passport Laws and Precedents* § 7.22 (1942), provided that passports not be issued to persons "guilty of disloyal acts, * * * bring-[ing] grave discredit to this country[, or] go[ing] abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States."

Thereafter, during World War II, the Department exercised its passport authority "to remove passports from the hands of persons engaged in activities not in the best interest of the United States." Stuart, *Safeguarding The State Through Passport Control*, 12 Dep't State Bull. 1066, 1068 (1945). See also 6 Fed. Reg. 5821, 6069, 6349 (1941); 7 Fed. Reg. 2590, 3708 (1942); *The Right to Travel: Hearing Pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 197-200 (1957). And immediately following the war, the Department resumed its peacetime policy of denying passports to persons whose activities are "inimical to the best interests of the United States or detrimental to international harmony and understanding." Foreign Service, Ser. No. 747 (Aug. 7, 1947). See, *e.g.*, 13 Dep't State Bull. 897 (Dec. 2, 1945); 17 Fed. Reg. 8013 (1952); 26 Dep't State Bull. 919 (June 9, 1952); United States Passport Office, *Abstract of Passport Laws and Precedents* § 7.21 (1956). In 1956, for example, the Secretary issued a regulation concerning the denial of a passport in any circumstance in which the applicant's travel abroad would be "prejudicial to the orderly conduct of foreign relations * * * or prejudicial to the interests of the United States." 21 Fed. Reg. 336 (1956). The current version of the Secretary's policy (22 C.F.R. 51.70(b)(4) and 51.71) was promulgated in 1968. See 33 Fed. Reg. 5681 (1968).[29]

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[29] These regulations did not escape congressional notice. See pages 39-40, *infra*. Thus, a 1960 congressional staff report concluded that "the authority to issue or withhold passports has, by precedent and law, been vested in the Secretary of State as a part of his responsibility to protect American citizens traveling abroad, and what he considered

Moreover, although there are no comprehensive compilations regarding passport revocations and denials under the 1926 Act, the revocation of respondent's passport is hardly unprecedented as a matter of actual practice. For example, in 1948, the Secretary denied Representative Isacson's request for a passport, because the congressman sought to attend a foreign conference in support of an ongoing Greek rebellion that this country was then opposing. See *N.Y. Times*, April 11, 1948, § E, at 9. Similarly, the Secretary revoked Col. Hubert Julian's passport in 1954, because his gun running activities abroad, although not illegal, were considered to be prejudicial to the interests of the United States. See *Developments in the Law—The National Security Interest and Civil Liberties*, *supra*, 85 Harv. L. Rev. at 1150-1151 n.76. More recently, in 1970, the passports of two persons were revoked in light of their intent to travel to the site of an international airplane hijacking. See *Sirhan* v. *Rogers*, No. 79-3865 (S.D.N.Y. Sept. 11, 1970), aff'd mem., No. 35364 (2d Cir. Oct. 5, 1970) (denying plaintiffs' request for injunctive relief). In addition, the State Department has submitted statistics to Congress on several occasions showing that the Secretary has repeatedly revoked

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to be the best interests of the Nation." *Reorganization of the Passport Functions of the Department of State, Staff Report on S.2095 of the Senate Comm. on Government Operations*, 86th Cong., 2d Sess. 13 (1960). See also *Proposed Travel Controls: Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 72 (1966); *Report of the President's Commission on the Assassination of President John F. Kennedy* 773-778 (1964) (the Warren Commission Report).

passports or denied passport applications on national security or foreign policy grounds.[30] In short, the Secretary's action here is consistent with two hundred years of passport practice.

2. *Post-1926 Legislative Developments*

a. The enactment of various travel control measures since 1926 evidences Congress' agreement that the Secretary has power under the Passport Act of 1926 to deny and revoke passports on national security and foreign policy grounds. In 1941, Congress amended the 1918 Travel Control Act in order to increase "the centralization of control over the entry into and departure from the United States of persons

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[30] In 1955, the Secretary revoked or denied at least six passports because the activities abroad of the person in question were deemed harmful to our foreign policy. One of these applicants "had participated in the local political affairs of a friendly foreign power, had been the source of complaint by the friendly power, and by his behavior had become an internal problem to the friendly power." *Department of State Passport Policies: Hearings Before the Senate Comm. on Foreign Relations*, 85th Cong., 1st Sess. 74 (1957); *The Right to Travel: Hearing Pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary* 128, 85th Cong., 1st Sess. (1957). See, *e.g.*, *id.* at 73-130 (collecting statistics on foreign policy and national security cases); *Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before the Senate Comm. on Foreign Relations*, 85th Cong., 2d Sess. 30, 40 (1958) (at least 57 passports revoked or denied in 1956 because passport holder had engaged in either "illegal activities or activities prejudicial to the orderly conduct of foreign relations"); *U.S. Passports Denial and Review: Hearings on H.R. 9991 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 12-13 (1956); Note, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 Yale L.J. 170, 174-178 (1952).

of all classes." S. Rep. No. 444, 77th Cong., 1st Sess. 2 (1941). Whereas the 1918 Act was applicable only in time of war, Congress now authorized the President to make possession of a passport a prerequisite for international travel during the national emergency declared by the President on May 27, 1941. See Act of June 21, 1941, ch. 210, Section 1, 55 Stat. 252-253; S. Rep. No. 444, *supra*, at 1-2; H.R. Rep. No. 754, 77th Cong., 1st Sess. 2 (1941). The Act was thus designed to promote "as far as possible the national defense" by permitting the Executive to stop the foreign travels of American citizens "who are directly engaged in espionage and subversive activities in the interests of foreign government * * * [or who] are engaged in activities inimical to the best interests of the United States." S. Rep. No. 444, *supra*, at 1-2. See 87 Cong. Rec. 5048-5052 (1941).

Subsequently, in April 1952, Congress extended the prohibition on travel without a passport for a one-year period in order "to insure the national security." Act of Apr. 14, 1952, ch. 204, Section 1(a)(40), 66 Stat. 54-57. Shortly thereafter, in June 1952, Congress enacted a new travel control provision that authorized the President to impose passport requirements on American travelers during any war or national emergency declared by the President. Immigration and Nationality Act of 1952, ch. 477, Section 215(b), 66 Stat. 190, codified at 8 U.S.C. (1970 ed.) 1185(b). See S. Rep. No. 1137, 82d Cong., 2d Sess. 14 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 53 (1952). At the same time, Congress created a Passport Office within the Department of State and instructed the Director of that office "to maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and Central In-

telligence Agency * * * for the purpose of obtaining and exchanging information for use in enforcing the provisions of this Act in the interest of the internal security of the United States." Immigration and Nationality Act of 1952, ch. 477, Sections 104-105, 66 Stat. 175, codified at 8 U.S.C. (1970 ed.) 1105. See S. Rep. No. 2231, 81st Cong., 2d Sess. 1-2 (1950); S. Rep. No. 1137, *supra*, at 8; H.R. Rep. No. 1365, *supra*, at 36.

It is thus apparent that Congress contemplated that citizens whose travels abroad would harm the national security or foreign policy of the United States would not be entitled to a passport. And because the travel control provisions of the 1941 and 1952 statutes, like the 1918 Act, did not themselves authorize the Secretary to deny or revoke passports on national security or any other grounds, Congress must have assumed that the Passport Act of 1926 had already vested such discretion in the Executive. The court of appeals' contrary conclusion regarding the Secretary's powers under the Passport Act means that the 1941 and 1952 travel control legislation failed in their central purpose—a wholly untenable result. See, *e.g.*, *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 560 (1963).

b. In the late 1950's, Congress again considered legislation regarding passport control. Although no statute was enacted or amended at that time, the legislative history demonstrates once more that Congress was aware of the Secretary's practice in this area and made no attempt to limit his authority. At all events, there is no support for respondent's contentions (Br. in Opp. 20-21 n.7, 26) that Congress expressly sought to deny the Secretary the discretion to protect the national security and foreign policy or

that the Department of State acknowledged its lack of authority in that regard.

In 1956, for example, a State Department official informing Congress about the number of passports revoked on foreign policy and national security grounds testified that "there are over 150 years of precedent in our country on this question of denying our citizens * * * who would interfere with [the Secretary's] obligations in carrying out our foreign policy, an American passport." *U.S. Passport Denial and Review: Hearings on H.R. 9991 Before Subcomm. No. 1 of the House Judiciary Comm.*, 84th Cong., 2d Sess. 12-13 (1956). See also *id.* at 2, 4-5, 7-8. Similarly, the next year, the Department again informed Congress about its regulations (including the predecessor version of 22 C.F.R. 51.70(b)(4)), interpretations, and historical practice of denying passports to persons "who were taking acts contrary to the policy of the United States." *The Right to Travel: Hearing pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 60 (1957). See *id.* at 59-60, 69-75, 87, 97, 100-101, 109-112, 128-219, 229, 248-249, 263-264, 266, 270-271, 273, 275-277, 309-311, 323, 328, 341-342, 343, 346-350, 379; *Department of State Passport Policies: Hearings Before the Senate Foreign Relations Comm.*, 85th Cong., 1st Sess. 2-3, 8-10, 38-40, 59-60, 63, 74, 79-80, 84 (1957). In addition, members of the various congressional committees expressed their understanding that the Secretary had power under the Passport Act of 1926 to revoke and deny passports in order to protect the national security and foreign policy. See *The Right to Travel*,

supra, at 69, 75, 87 (remarks of Sens. Hruska and O'Mahoney); *Department of States Passport Policies*, *supra*, at 9-10, 92, 113 (remarks of Sens. Fulbright, Green, and Capehart).[31]

Thereafter, following the Court's decision in *Kent*, the Executive Branch sought congressional clarification of its authority in this area. In a message to Congress, President Eisenhower noted that the Secretary of State had traditionally exercised his discretion to refuse passports where the applicant's travel would be "inimical to United States foreign relations" (H.R. Rep. No. 2684, 85th Cong., 2d Sess. 2 (1958)), and he urged that Congress pass legislation overruling the *Kent* decision insofar as it precluded the denial of passports to Communists (*id.* at 2-3). Neither the administration's proposed legislation nor any other draft bills concerning passport control and travel by Communists were enacted at that time.

We submit that no adverse inference about the Secretary's passport power may be drawn from this sequence of events. First, it is well settled that the Executive does not "admit[] that it is acting upon a wrong construction by seeking ratification from Congress." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950). See, *e.g.*, *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-611 (1966); *United States* v. *Wise*, 370 U.S. 405, 411 (1962). Furthermore the legislative hearings and debates focused almost exclusively

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[31] Other witnesses echoed this understanding. For example, a spokesman for the American Civil Liberties Union testified that the ACLU "supports the propriety of denying a passport where the State Department has substantial evidence that the applicant is going abroad to engage in subversive activity against the United States." *Department of State Passport Policies, supra*, at 136. See *id.* at 136-137.

on the preceived problem of the worldwide Communist conspiracy and on overruling *Kent*, not on the distinct question posed by this case. See generally *Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs*, 85th Cong., 2d Sess. (1958) ("*Denial of Passports*"); *Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before the Senate Comm. on Foreign Relations*, 85th Cong., 2d Sess. (1958) ("*Passport Legislation I*"); *Passport Legislation: Hearings on S. 806, S. 1973, S. 2287, and S. 2315 Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. (1959) ("*Passport Legislation II*"); *Providing Standards for the Issuance of Passports and for Other Purposes: Hearings on H.R. 9069 Before the House Comm. on Foreign Affairs*, 86th Cong., 1st Sess. (1959); 104 Cong. Rec. 19654-19658 (1958).

More important, insofar as Congress considered the Secretary's power to revoke and deny passports on national security and foreign policy grounds, it apparently approved the established administrative construction. Contrary to respondent's contention (Br. in Opp. 20-21 n.7), State Department representatives uniformly testified before Congress that "the Secretary and the President actually have th[e] power [to deny passports on foreign policy and national security grounds] right now," and that that power was "not in any way affected by the Supreme Court's decision [in *Kent*]." *Denial of Passports*, *supra*, at 7. See, *e.g.*, *id.* at 32, 63; *The Right to Travel*, *supra*, at 379; *Passport Legislation I*, *supra*, at 23, 41; *Providing Standards for the Issuance of Passports*, *supra*, at 8, 178; *Passport Legislation II*,

supra, at 59, 62. Although Congress was thus fully aware of the Secretary's view, it nonetheless declined to enact proposed legislation that would have severely limited the Executive's authority regarding the denial and revocation of passports on foreign policy and national security grounds. See, *e.g.*, H.R. 13652, 85th Cong., 2d Sess. (1958); S. 806 and S. 2095, 86th Cong., 1st Sess. (1959); *Passport Legislation II*, *supra*, at 3-6; *Denial of Passports*, *supra*, at 94-97; *The Passport Reorganization Act of 1959: Hearings on S. 2095 Before a Special Subcomm. of the Senate Comm. on Government Operations*, 86th Cong., 1st Sess. 3-7, 11-12 (1959).

3. *1978 Amendments*

In 1978, Congress again "revisited the Act and left the [Secretary's] practice untouched." *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). See, *e.g.*, *Andrus* v. *Allard*, 444 U.S. 51, 57 (1979); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978). Section 707(b) of the Foreign Relations Authorization Act, Fiscal Year 1979, establishes that, except as otherwise provided by the Executive, all American citizens must have a passport while entering or departing the United States. See Pub. L. No. 95-426, Section 707(b), 92 Stat. 993, codified at 8 U.S.C. (Supp. II) 1185(b). Previously, as we have noted above, the passport requirement was applicable only in times of war or national emergency. See page 41, *supra*.[32]

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[32] The decision to enact the passport requirement on a permanent, non-emergency basis was an outgrowth of a comprehensive congressional review of all legislation governing Executive authority in time of national emergency. In 1976, Congress determined that most emergency powers, in-

At the same time, Congress amended the Passport Act itself to limit the circumstances in which the Secretary may impose area restrictions. But Congress did not otherwise restrict the Secretary's broad powers under the Act. To the contrary, the Senate Report accompanying the 1978 amendments makes clear that Congress intended to preserve the Secretary's authority to deny and revoke passports to protect the national security and foreign policy of the United States. "The committee recognizes clearly that the passport authority should not be restricted in any way which would limit the President's ability to control the departure of U.S. citizens to foreign countries when such travel is inconsistent with a greater government interest * * *." S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978).

In sum, Congress has been fully informed of and has acquiesced in the Secretary's longstanding view of the Act. Accordingly, the court of appeals erroneously concluded that the Executive is without power to revoke or deny a passport in order to protect the vital interests of this country.

D. The Decision Below Substantially Interferes With The Executive's Ability To Conduct Foreign Affairs And To Protect The National Security

Although the primary issue in this case concerns the construction of a statute, the controversy arises

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cluding travel control, should be terminated as of September 14, 1978. See National Emergencies Act, Pub. L. No. 94-412, Section 101, 90 Stat. 1255. But, as indicated above, in 1978, just as the emergency period was expiring, Congress agreed to continue the passport requirement at all times, thus further demonstrating that the Secretary's passport authority is not based on the existence of a war or other national emergency.

in the context of the Executive's constitutional responsibilities in the fields of foreign affairs and national defense. The Executive wields "very delicate, plenary, and exclusive power" over the country's foreign affairs and has been described by this Court as the "sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). See United States Constitution Article II, Section 3, Clause 2; *Goldwater* v. *Carter*, 444 U.S. 996 (1979); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *United States* v. *Pink*, 315 U.S. 207, 222-223 (1942). In addition, the President, as the Commander-in-Chief, has ultimate responsibility for the preservation of the nation's security. See United States Constitution Article II, Section 2, Clause 1; *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109-112 (1948). And, of particular relevance to this case, the Executive has statutory duties, as well as inherent responsibilities, "to obtain or effectuate the release" of "any citizen * * * unjustly deprived of his liberty by or under the authority of any foreign government" (22 U.S.C. 1732) and to "protec[t] intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)).

The Executive's exercise of discretion pursuant to the Passport Act is directly related to those powers and responsibilities. Indeed, the passport itself is an instrument of diplomacy "in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely." *United States* v. *Laub*, 385 U.S. 475, 481 (1967). See *e.g.*, *Kent* v. *Dulles*, *supra*, 357 U.S. at 120-121; *Urtetiqui* v. *D'Arcy*, *supra*, 34 U.S.

(9 Pet.) at 399.[33] The history of passport control canvassed above and the events giving rise to this case "establis[h] that either the behavior or the predicament of an individual citizen in a foreign country can bring into clash, peaceful or violent, the powers of his own government and those of the foreign power." *Worthy* v. *Herter*, *supra*, 270 F.2d at 911. See, *e.g.*, *Zemel* v. *Rusk*, *supra*; *Perez* v. *Brownell*, 356 U.S. 44, 59 (1958); *MacEwan* v. *Rusk*, 228 F. Supp. 306, 308-312 (E.D. Pa. 1964).[34]

Because construction and application of the Passport Act implicates both a broad delegation of statutory authority and the Executive's inherent responsibilities under the Constitution, the courts "should hesitate long before limiting or embarrassing such powers." *MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915). As this Court explained in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952), "the conduct of foreign relations [and] the war power * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial

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[33] Each American passport states that "[t]he Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen[s]/national[s] of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection." The irony of the court of appeals' decision is painfully apparent. In the court of appeals' view, the United States is required to facilitate respondent's travels and to ask for the good offices of other countries on behalf of respondent, even though respondent freely concedes that his travels are harming, and are intended to harm, this nation's security and foreign relations.

[34] For example, respondent's activities abroad have caused him to be deported from Great Britain, France, Germany, and Holland. See also note 3, *supra*.

inquiry or interference." See, *e.g.*, *Goldwater* v. *Carter*, *supra*; *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 423; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, *supra*, 333 U.S. at 109-112; *United States* v. *Belmont*, 301 U.S. 324, 328 (1937); *United States* v. *Curtiss-Wright Corp.*, *supra*, 299 U.S. at 319-322. The decision of the court of appeals strays far from these principles.

As a consequence of the court of appeals' cramped construction of the Passport Act, the Executive is powerless to restrict the international travels of persons such as respondent unless that person is under indictment. To be sure, the government may deny a passport to an applicant who is "participating in illegal conduct [or] trying to escape the toils of the law * * *." *Kent* v. *Dulles*, *supra*, 357 U.S. at 127; *Zemel* v. *Rusk*, *supra*, 381 U.S. at 13. See 22 C.F.R. 51.70. But nothing in this Court's prior opinions or the history of passport control suggests either that such revocation need be predicated on the institution of formal criminal proceedings[35] or that the reasons for revocation need be limited to the applicant's criminal conduct. Indeed, the area restrictions upheld in *Zemel* were based solely on foreign policy and national security considerations without reference to the prior or future criminal intent of the passport applicant.[36]

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[35] As detailed in Judge MacKinnon's dissenting opinion in the court of appeals, respondent's activities abroad may well have violated various criminal statutes, including 18 U.S.C. 793. See Pet. App. 57a-63a, 74a-91a.

[36] In *Kent*, the Court observed that "the cases of refusal of passports generally fell into two categories * * * [:] questions pertinent to the citizenship of the applicant * * * [and] whether the applicant was participating in illegal conduct

The narrow rule adopted by the court of appeals fails to protect adequately the national security and foreign policy interests of this country. In many instances, the Executive might be unable to obtain an indictment of the passport holder until after he has actually caused serious damage to this country's vital interests. For example, respondent's future conduct with regard to the hostage situation in Iran is not an appropriate basis for a criminal prosecution at this time, even though his activities abroad might well result in substantial harm to the national security and foreign policy of the United States. Moreover, as the Court recently recognized, prosecution of a person such as respondent "would subject the CIA and its officials to probing discovery into the Agency's highly confidential affairs. * * * When the Government cannot secure its remedy without unacceptable risks, it has no remedy at all." *Snepp* v. *United States*, 444 U.S. 507, 514-515 (1980).

Equally important, the decision of the court of appeals ties the Executive's hands in circumstances in which obviously dangerous foreign travel does not and will not violate any domestic criminal provision. To cite just one example, an American citizen might seek to travel abroad, purchase a weapon there, and attempt to assassinate a foreign leader or overthrow a foreign government. The court of appeals has con-

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* * *." 357 U.S. at 127. But, as the history of passport control and the Court's decisions in *Kent* and *Zemel* make clear, that admittedly general description of prior practice is hardly exhaustive. Thus, the Court prefaced its description with the phrase "[s]o far as material here" (357 U.S. at 127), and it further stated that "[o]ne can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated" (*id.* at 128). See also note 12, *supra*.

cluded that the Executive is powerless to deny a passport in that situation and that therefore the Secretary must facilitate the applicant's pernicious scheme, even though the assassination attempt undoubtedly would strain our relations with that foreign government and could conceivably impel this country into armed hostilities. Congress clearly cannot have intended that absurd result (see, *e.g.*, *United States* v. *Ryan*, 284 U.S. 167, 175 (1931)), and the language and legislative history of the Passport Act described above demonstrate that it did not do so.[37]

II

THE SECRETARY'S REVOCATION OF RESPONDENT'S PASSPORT ON NATIONAL SECURITY AND FOREIGN POLICY GROUNDS DOES NOT VIOLATE RESPONDENT'S CONSTITUTIONAL RIGHTS

A. The Fifth Amendment Permits The Secretary To Impose International Travel Restrictions As A Means Of Protecting The National Security And Foreign Policy

The revocation of respondent's passport unquestionably will affect his ability to travel abroad. Unless otherwise ordered by the Executive, it is unlawful for a citizen to enter or leave this country without a valid passport. See 8 U.S.C. (Supp. II) 1185 (b).[38] Moreover, once abroad, possession of a pass-

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[37] Indeed, when this very hypothetical case was discussed in a Senate hearing in 1958, Senator Sparkman remarked that the Secretary's power to revoke a passport in that circumstance in order to protect the country's security and foreign policy interests was beyond dispute. *Passport Legislation I*, *supra*, at 37.

[38] 22 C.F.R. 53.2(b) provides that no passport is required on journeys of less than 60 days to any country in North, South, or Central America, except Cuba. In 1978, Congress deleted the criminal penalty for violating the prohibition set

port is often helpful, if not essential, to travel within and between foreign countries. See, *e.g.*, *Zemel* v. *Rusk*, *supra*, 381 U.S. at 13-14; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 507 (1964); *Kent* v. *Dulles*, *supra*, 357 U.S. at 121-122. For example, we are informed that respondent's continued residence in the Federal Republic of Germany may well depend upon his possession of a valid American passport. See Auslaendergesetz art. III(1) (1965) ("Foreigners who enter the area of jurisdiction of this law, and want to reside in it, or leave it, must show a passport."). Accordingly, we do not dispute that the revocation of respondent's passport implicates his right to travel internationally, which is protected by the Fifth Amendment. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170, 175-177 (1978); *Zemel* v. *Rusk*, *supra*, 381 U.S. at 14; *Kent* v. *Dulles*, *supra*, 357 U.S. at 125.

Although respondent's right of international travel "is part of the liberty of which the citizen cannot be deprived without due process of law" (*Kent* v. *Dulles*, *supra*, 357 U.S. at 125), it is not a fundamental right, such as the right of interstate travel. See, *e.g.*, *Califano* v. *Aznavorian*, *supra*, 439 U.S. at 176-177; *Califano* v. *Torres*, 435 U.S. 1, 4 n.6 (1978). Rather, this case concerns only respondent's more limited interest in traveling abroad freely, and that interest, as the Court explained in *Zemel* v. *Rusk*, *supra*, is subject to reasonable regulation and restriction. See 381 U.S. at 14-15. The Court therefore had no difficulty concluding in *Zemel* that, pursuant to the government's interest in national security and foreign policy, the Secretary could impose limitations on the right to foreign travel. See *id.* at 13-16. See also

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forth in 8 U.S.C. (Supp. II) 1185(b). See Pub. L. No. 95-426, Section 707(d), 92 Stat. 993.

Aptheker v. *Secretary of State*, *supra*, 378 U.S. at 509; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159-160 (1963).

Application of these principles to this case shows that respondent's Fifth Amendment claim is insubstantial. The Secretary's regulation permits a passport to be revoked only on the basis of "*serious damage*" to the "national security or foreign policy." 22 C.F.R. 51.70(b)(4) (emphasis added). Hence, here, as in *Zemel*, the challenged regulation by definition "is supported by the weightiest considerations of national security" and "foreign policy" (381 U.S. at 16, 13). See also *Freedom to Travel*, Report of the Special Comm. to Study Passport Procedures of the Ass'n of the Bar of the City of New York, 58-62 (1958) (concluding that passports may constitutionally be denied to protect national security). Moreover, although respondent's challenge is limited to the validity of the regulation on its face, there is also no question that the Secretary's application of the regulation in this case is well warranted. Respondent's actions abroad have caused several foreign governments to expel him and even now could threaten the delicate diplomatic crisis existing between this country and Iran. See pages 5-6 & n.5, *supra*. In addition, respondent's campaign against the CIA subjects government personnel—whether or not CIA employees—to substantial risks and undermines the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980).[39]

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[39] Respondent's concession that he is covered by 22 C.F.R. 51.70(b)(4) vitiates any claim that the regulation is imper-

B. 22 C.F.R. 51.70(b)(4) Does Not Abridge Respondent's First Amendment Rights

For similar reasons, respondent's First Amendment claims are without merit. In light of respondent's concession that he falls within the terms of 22 C.F.R. 51.70(b)(4), the only question is whether that regulation on its face impermissibly trenches upon First Amendment rights. But that regulation focuses on dangerous *conduct* and not protected speech or associational activities. Revocation of a passport pursuant to 22 C.F.R. 51.70(b)(4) thus only indirectly affects respondent's right to speak, if at all. See *Zemel* v. *Rusk*, *supra*, 381 U.S. at 16. Indeed, as respondent pointed out in the court of appeals, "[t]he government * * * cannot stop present speech-making and writing * * * by revoking respondent's passport." Resp. Mem. In Opp. to App. for a Stay 4.

In any event, the government may constitutionally impose reasonable restrictions on conduct, including speech, that seriously harms the national security and foreign policy of the United States. As the Court remarked in *Kennedy* v. *Mendoza-Martinez*, *supra*, 372 U.S. at 160, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." Thus, this Court has repeatedly sustained limitations on speech that directly and adversely affect the government's overriding interests in promoting the nation's defense and foreign relations, including its compelling interest in preventing disclosures that imperil our foreign intelligence service. See, *e.g.*, *Snepp* v. *United States*, *supra*, 444 U.S. at 509 n.3; *Brown* v. *Glines*, 444 U.S. 348, 354-358 (1980); *United States* v. *O'Brien*, 391 U.S. 367,

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missibly vague. See *Parker* v. *Levy*, 417 U.S. 733, 755-756 (1974).

376 (1968); *Zemel* v. *Rusk*, *supra*, 381 U.S. at 16-17. Because 22 C.F.R. 51.70(b)(4) is directly related to these compelling societal interests, those cases are controlling here.

Finally, the regulation is not overbroad. It is a neutral and noncensorial provision carefully tailored to prevent "activities abroad" that cause "serious" harm to the nation's security and foreign relations. Moreover, as the history of passport control shows, 22 C.F.R. 51.70(b)(4) and its predecessors have been both narrowly construed and sparingly applied primarily to cases of harmful conduct not involving protected speech at all.[40] See pages 24, 26-30, 36-40, *supra*.[41] Because the national security and foreign policy regulation thus "covers a whole range of easily identifiable and constitutionality proscribable * * * conduct," it is not facially invalid. *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 581 (1973). Accord, *Parker* v. *Levy*, 417 U.S. 733, 760-761 (1974); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613-615 (1973). Insofar as the regulation could conceivably be applied to constitutionally protected conduct, that problem "should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 615-616.

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[40] The initial determination to deny or revoke a passport is made by the Secretary of State personally. Following an administrative hearing and further administrative review (see 22 C.F.R. 51.80-51.89 and 7.1-7.11), the revocation or denial is subject to judicial review. See, *e.g.*, *Kraus* v. *Dulles*, 235 F.2d 840 (D.C. Cir. 1956). Here, respondent waived his right to an administrative hearing and review.

[41] The revocation of passports condemned in *Kent* was effected pursuant to a separate regulation solely concerning Communists. See 357 U.S. at 117-118 & n.1.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 80-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDMUND S. MUSKIE, SECRETARY OF STATE,

Petitioner,

—v.—

PHILIP AGEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATEMENT OF THE CASE

Petitioner's statement of the case correctly describes the affidavits filed by government officials in this case.[1/] With a notable exception referred to below, Mr. Agee and counsel did not believe it was necessary to contest the government's affidavits point by point, since the theory of the case, which has been sustained by both courts below, is that the Secretary of State has no Congressional authorization to deny or revoke passports under 22 C.F.R. §51.70(b) no matter what accusations might be made against a citizen. For that reason, counsel conceded below, but only for the

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[1/] Affidavits submitted to support stay applications, as were most of petitioner's affidavits, were not before the District Court when it ruled on the summary judgment motions, and are therefore not properly part of the record on certiorari.

purpose of squarely challenging the Secretary's authority, that Mr. Agee's activities have caused serious damage to the national security or foreign policy of the United States.[2/]

The significance of that factual concession is no different than if the Secretary, rather than cancelling Mr. Agee's passport, had filed suit to revoke it, had alleged in his complaint the same facts contained in the present affidavits, and Mr. Agee had responded with a motion to dismiss under Rule 12(b)(6), F. R. Civ. P., as the procedural device for raising the question whether the Secretary's assertion of power under §51.70(b)(4) was authorized

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[2/] See Joint Appendix (J.A.) 10-13; 21-22, ¶6 n.1; 23, ¶¶6,7.

by Congress. In that posture, the allegations in the complaint would be taken as true only for the purposes of the motion, but not for any other purpose. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

Thus, the government is incorrect in asserting that Mr. Agee "waived his right to an administrative hearing" (Br. 2 n.1, 7). Mr. Agee's theory, which was specifically alleged in the complaint (Para. 9), made clear in the District Court (JA 23), and understood by the district judge (JA 15), was that it was unnecessary to exhaust administrative remedies as a prerequisite to challenging the Secretary's statutory authority to act at all, and that should Mr. Agee ultimately not win on that ground, he would then pursue his administrative remedies. In addition, in a cable to the United States Consul, Hamburg, West Germany, dated

February 19, 1980, which is not in the record, counsel formally and timely requested a hearing for Mr. Agee under Sections 51.80 et. seq. "subject to the disposition of the lawsuit on his behalf now pending in the District of Columbia."3/

The one factual accusation which Mr. Agee contested below was a report contained in the New York Post of December 17, 1979, submitted by government counsel in opposition to Mr. Agee's motion for a temporary restraining order, that Mr. Agee had been invited to travel to Iran to participate in a tribunal involving the American hostages who had recently been taken into captivity (Pet. App. 103a). Since Mr. Agee had received no such invitation and

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3/ Under the regulations, Mr. Agee is entitled to a trial type hearing upon revocation of his passport. 22 C.F.R. §51.80 ff.

would not have accepted it under any circumstances (JA 29-30), and the government's use of the false report from the New York Post, a notoriously unreliable newspaper and the only one in the country in which the report appeared, was such an obvious and deceitful attempt to prejudice the court against Mr. Agee, the accusation was challenged as a matter of principle.4/

Mr. Agee does not dispute that he has openly and publicly criticized the Central Intelligence Agency's activities abroad. He believes that the "CIA continues to intervene on the side of 'friends' whose property and privilege rest on the remnants of archaic social systems long since discredited" (C.A.App.70). He has, of course, the right to hold and express those opinions.

4/ The government's description of the report is as unreliable as the report itself. The government says that the Post reported that Mr. Agee "had been invited" to Iran (Br. 5). Actually, the report said only that Mr. Agee was identified by an anonymous Iranian diplomat as a "candidate" for an invitation, not that the invitation had been extended. Court of Appeals Appendix (CA App.) 92.

SUMMARY OF ARGUMENT

I. A. Kent v. Dulles, 357 U.S. 116 (1958), and Zemel v. Rusk, 381 U.S. 1 (1965), read together, hold that the right to travel is a part of the liberty of which a citizen cannot be deprived without due process of law under the Fifth Amendment. That right can only be abridged pursuant to the law-making functions of Congress. The only explicit or implicit authority found in those cases to have been granted by Congress to the Executive Branch relates to citizenship, illegal activities, and area restrictions. Because Congress has not explicitly authorized revocations for the reasons relied on by the Secretary here--danger to the national security or foreign policy of the United States--implicit authorization must rest upon a substantial and consistent administrative practice which is sufficient to warrant the conclusion that it has been approved by Congress.

B. As shown below, there is no historical practice authorizing revocation of respondent's passport on the grounds asserted by the Secretary in this case. However, short of that conclusion, Kent and Dayton v. Dulles, 357 U.S. 144, establish on their facts the invalidity of the action taken. The purpose of the power asserted and held invalid in those cases--the right to withhold passports from Communist Party members and supporters--is functionally indistinguishable from the power asserted in this case: the right to withhold passports from citizens whose activities abroad threaten the national security or foreign policy of the United States. The dissenting opinion in Kent (and the majority opinion in Dayton) demonstrate explicitly that passports were withheld in those cases to protect the national security or foreign policy of the United States. Since there has been no subsequent Congressional authorization for refusal of passports on those grounds, Kent and Dayton control this case.

C. To establish the historical practice which is the prerequisite to finding implied Congressional authorization, the government relies on seven actions, ostensibly on national security grounds, from 1906 to 1970. Only one of those is unambiguously identical to the power asserted in this case; the others are either closely related to illegal activity, for which passports may be refused as held in Kent, or are so ambiguously related to national security or foreign policy as to be an insufficient basis upon which to rest the denial of a constitutionally-protected liberty. As the court below held, "such evidence hardly amounts to a 'substantial and consistent administrative practice.'" In addition, ranking government officials made it clear to Congress that they believed that the Kent decision prohibited refusals of passports for national security or foreign policy reasons, and explicitly requested legislation to reverse the result of Kent.

After close attention, Congress refused to pass such legislation.

D. The legislative history confirms the Executive's lack of discretion here. Congress has consistently rejected peacetime travel controls. In 1918 and 1941, when wartime controls were imposed, Congress expressly decided that travel control would not extend into peacetime. In 1919 and 1921, Congress expressly rejected administration-sponsored attempts to impose peacetime controls, and the 1926 Act must be read in light of that strong Congressional opposition to travel control. Kent and Dayton held that the 1952 Act did not authorize peacetime travel controls on national security grounds. The 1978 Congress expressly legislated to facilitate travel by withdrawing most area control authority and eliminating any penalties for traveling without a passport.

E. The decision below, which rested on a statutory ground, does not interfere

with the Executive's exercise of foreign affairs responsibilities, and if it did, the Executive's recourse would be to Congress, not the courts. Invocation of the spectre of national security cannot create powers to abridge liberty that Congress has not conferred. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).

II. Assuming arguendo that the revocation is statutorily authorized, it nevertheless violated respondent's constitutional rights.

A. The revocation impermissibly abridged respondent's right to travel. As the administrative practice the Secretary relies on demonstrates, the standard for regulation also sweeps too broadly.

B. The government is forbidden by the First Amendment from restricting, as it has here, the right to travel in order to deter or suppress political speech.

C. Due process requires at least notice and an informal opportunity to be heard prior to the summary deprivation of liberty. The failure to afford respondent any of these basic requirements prior to summary revocation of his passport violated his right to procedural due process.

ARGUMENT

I. THE EXECUTIVE HAS NO AUTHORITY FROM CONGRESS TO REVOKE A PASSPORT FOR THE PURPOSE OF PROTECTING THE "NATIONAL SECURITY OR FOREIGN POLICY OF THE UNITED STATES".

A. The Constitutional Background

This Court held in Kent v. Dulles, 357 U.S. 116 (1958), that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment" (id. at 125), that the Secretary of State does not have "unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose" (id. at 128), and "if that liberty is to be regulated, it must be pursuant to the law-making functions of Congress" (id. at 129). In Zemel v. Rusk, 381 U.S. 1, 12 (1965), the Court held that if implicit Congressional authorization for restriction on travel of American citizens

is to be found at all, it must rest upon an "administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it".

In this case, the government does not claim explicit authorization for Sec. 51.70 (b)(4), but only implicit authorization. The court below was unable to find the necessary foundation for implicit authorization. It held that the government's five "scattered examples" of passport refusals "which were even arguably for national security or foreign policy reasons" did not "amount to a 'substantial and consistent administrative practice'" (Pet. App. 13a-14a), and that the Secretary's reliance on "a series of statutes, regulations, proclamations, orders and advisory opinions dating back to 1856" (Pet. App. 14a) was irrelevant since "the criterion

for establishing congressional assent by inaction is the actual imposition of sanctions and not the mere assertion of power" (Pet. App. 15a), as Kent v. Dulles held, 357 U.S. at 127.5/

Mindful of its own principle that it will "construe narrowly all delegated powers that curtail or dilute the right to travel" (id. at 129), this Court must come to the same conclusion.

Before we give our close attention to the legislative history and administrative practices relevant to this case, we will review the cases which demonstrate how the principles announced in Kent v. Dulles have been strictly applied by this Court

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5/"The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly."

and the lower federal courts to serve the constitutionally protected right to travel. We begin with a closer description of Kent v. Dulles, because we believe that, in addition to stating the guiding principles to be applied in this case, it also disposes of this case on its facts, as we show below.

In Kent v. Dulles, the Secretary of State denied two persons passports under regulations purporting to protect the "national interest" by prohibiting issuance of passports to members of the Communist Party, or to persons who "engage in activities which support the Communist movement" or "are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement." 357 U.S. at 117 n.1. The regulations, which were promulgated under

the purported authority of 22 U.S.C. §211a, the same statutory provision relied upon here, declared that "In order to promote the national interest by assuring that persons who support the world Communist movement...may not, through the use of United States passports, further the purposes of that movement," passports would not be issued to Communist Party members or supporters.

On the basis of the constitutional principles relating to the requirement of Congressional authority for refusal of passports by the Executive, this Court found that the regulations were unauthorized and invalid.

In reviewing the history of passport control, the Court found that Congress had authorized passport refusals in only two categories of cases: where the applicant was neither a citizen nor otherwise owed

allegiance to the United States, and where the applicant "was participating in illegal conduct, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." 357 U.S. at 127.[6/]

In Kent, as in the case at bar, the government argued, based upon the broad language of §211a and 8 U.S.C. §1185, that the Secretary of State had broad discretion in the passport field. The Court rejected that argument. Acknowledging that under §211a and its predecessor, "The Scholars, the courts, the Chief Executive, and the Attorneys General" all said that the issuance of passports is "a discre-

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[6/] The Secretary's stated purpose in revoking Mr. Agee's passport did not rest on any of these grounds.

Sec. 51.70(a)(1) requires refusal of a passport to a citizen who "is the subject of an outstanding Federal warrant of arrest for a felony...", as the Court of Appeals noted. Pet. App. 16a n.10.

tionary act," the Court held, nonetheless, that the controlling consideration was "the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion." 357 U.S. at 124-125. The basis for the narrow holding was the Court's recognition of travel as a constitutionally protected right. As such, "we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold [passports]." Id. at 129.[7/]

Seven years later, in Zemel v. Rusk, the question before the Court was the validity of an area travel ban imposed by the Secretary of State to prohibit travel by all United States citizens to Cuba. The Court confirmed its holding in Kent

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[7/] The conclusion rested upon the legislative history and construction of both §211a and 8 U.S.C. §1185. 357 U.S. at 128, 129, 130.

that the Secretary's power to limit a citizen's travel must rest on statutory authorization from Congress. However, the Court found that, in the absence of explicit authority by Congress, area restrictions were valid because they were part of a longstanding "administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it" when §211a was adopted in 1926. 381 U.S. at 12. The finding rested on proof of actual and widespread implementation of area restrictions for a decade before 1926, and afterwards. 381 U.S. at 8-11. [8/]

[8/] In terms directly applicable to the case at bar, the Court contrasted its Zemel and Kent decisions. Kent, the Court held, conclusively decided that the 1926 Congress forbade the Secretary power to deny passports by reason of "the character of the particular applicant." Id. at 13. Zemel, however, was a decision based upon "foreign policy considerations affecting all citizens." Ibid. Emphasizing the point, (footnote cont'd next page)

Two other cases, both from the District of Columbia Circuit, demonstrate the consistent judicial understanding of the Kent doctrine.

The first, Woodward v. Rogers, 344 F.Supp. 974 (D.D.C. 1972), aff'd. summarily, 486 F.2d 1317 (D.C. Cir. 1973), was a suit challenging the State Department requirement that an oath of allegiance be executed as a condition to issuance of a passport.

(footnote cont'd from previous page)

the Court observed that Zemel's claim "is different from that which was raised in Kent v. Dulles...for refusal to validate appellant's passport does not result from any expression or association on his part; appellant is not being forced to choose between membership in an organization and freedom to travel." Id. at 16. The Court reaffirmed that denials based on factors related to an applicant's conduct were not authorized by the 1926 Act, which "authorized only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" Id. at 17 (citations omitted).

The Department had required such an oath from 1861 to 1966, but it was eliminated in 1966. In 1971, the Department attempted to reinstate the oath requirement by issuing instructions to its employees to that effect. 344 F.Supp. at 981. Searching the legislation for explicit authorization for the oath, the court concluded that none existed. Id. at 983-985. But the government argued that, given the prior longstanding requirement, legislative sanction was to be implied from the failure of Congress to affirmatively prohibit the oath requirement. The court rejected that argument out of hand on the ground that "the Supreme Court has made it plain that only the clearest of such evidence will permit this Court to consider Congressional silence to be a substitute for explicit and affirmative legislative action in limiting the free exercise of important rights. See, e.g.,

Greene v. McElroy, 360 U.S. 474 (1959), Kent v. Dulles, 357 U.S. 116, 129 (1958), ..." Id. at 985. The Court distinguished the implicit authorization found in Zemel on the ground that "that decision was reached only after an exhaustive review of State Department precedents, detailed and specific Executive Orders and subsequent legislation convinced the Court that Congress had delegated the authority to refuse to validate passports of United States citizens for travel to Cuba." Id. at 985-986.

In Lynd v. Rusk, 389 F.2d 940 (D.C.Cir. 1967), the question was whether the Secretary could enforce compliance with area restrictions -- as allowed in Zemel -- by withdrawing a passport from a citizen who declined to give assurance that he would not travel to the designated areas. The appellant had stated that he

would not use his passport to travel to restricted areas, but reserved the right to travel to those areas without using a passport. Because of that reservation, the Secretary revoked Mr. Lynd's passport, and he was effectively barred from traveling abroad.

Noting "the constitutional dimension of the right to travel," 389 F.2d at 942, and that, under Kent v. Dulles, statutory limits on the right to travel "will be strictly construed", id. at 945, the Court concluded that there was no "basis for inferring that Congress has given the Secretary the authority to deny legitimate, constitutionally protected travel [to areas which are not restricted], merely because that is a technique which provides greater assurance of hindering travel to designated areas." Id. at 946.

Significantly, the government's claim

in Lynd rested on the assertion that enforcement of the area restrictions was important because travel to those areas by United States citizens "would be inimical to the nation's foreign relations." Id. at 941. But invocation of that spectre was inadequate to overcome the strict rule that the Secretary of State's power to invade the constitutionally protected right to travel would be very narrowly construed.

Aptheker v. Secretary of State, 378 U.S. 500 (1964), shows that, even when Congress has adopted legislation which attempts to limit the issuance of passports for reasons, which, as here, involved national security or foreign policy considerations, this Court has jealously protected the constitutional right to travel.

Aptheker involved the validity of a

provision of the Subversive Activities Control Act, 50 U.S.C. §785, prohibiting members of the Communist Party, after the Party was required to register under the Act, from applying for or using passports. The Court held the provision unconstitutional on the ground that it "too broadly and indiscriminately restricts the right to travel and therefore abridges the liberty guaranteed by the Fifth Amendment." Id. at 504.

Noting that the statute "flows... from the congressional desire to protect our national security" (id. at 509), the Court nonetheless held that it was impermissibly broad (id. at 508), that there were "less drastic means for achieving the same basic purpose" (ibid.); that there was no relationship between the fact of membership in the Communist Party and the individual's commitment to

its illegal purposes (id. at 511), and that the statutory prohibition "applies regardless of the purposes for which an individual wishes to travel" (Ibid). In conclusion, the Court characterized the statute as "not a regulation 'narrowly drawn to prevent the supposed evil', cf. Cantwell v. Connecticut, 310 U.S. at 307, yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms..." (Id. at 514).

Thus, even where the Congress has adopted legislation affecting issuance of passports, this Court, in protecting the constitutional right to travel, imposed demanding standards which the statute was unable to satisfy. 9/

9/ The constitutional right to travel also contributed to this Court's refusal to allow prosecution of citizens who traveled to countries for which United States passports were invalid. United States v. Laub, 385 U.S. 475 (1967).

B. Kent v. Dulles And Its Companion Case, Dayton v. Dulles, Dispose Of The Case At Bar.

The facts of Kent and Dayton v. Dulles, 357 U.S. 144, and the regulation which they involved, dispose of the case at bar without the need for further inquiry into the question of Congressional authorization. We believe that, having held that the regulation in Kent and Dayton was unauthorized, the Court must come to the same conclusion here, for the three cases are functionally indistinguishable.

The regulation involved in Kent and Dayton, 22 C.F.R. §51.135,[10/] declared that "In order to promote the national interest by assuring that persons who support the world Communist movement...

10/ See 357 U.S. at 177 n.1.

may not, through the use of United States passports, further the purposes of that movement," passports would not be issued to Communist Party members or supporters.

The facts of both cases, as well as common sense, support the obvious conclusion that the purpose of §51.135 was identical to the purpose of §51.70(b)(4) -- to protect the national security or foreign policy of the United States.

First, in the perpetual post-World War II international competition between the United States and the Soviet Union, the interests at stake have never been defined as involving anything less than the national security and the foreign policy of the United States. Whatever served the Soviet Union's national security and foreign policy was seen to injure the United States' national security and foreign policy, and vice versa. Sec.

51.135 directly served that struggle. It announced that its purpose was "to promote the national interest" of the United States, declared that the use of United States passports by American Communists and supporters would "further the purposes" of the Communist movement, and therefore forbad issuance of passports to such individuals. Thus, United States citizens who were members of the Communist Party, or supporters of the Party, were to be forbidden to travel abroad for fear that they would assist the world Communist movement, and thus injure the national security or foreign policy of the United States.

The regulation speaks clearly, and it speaks for itself. There is no other possible interpretation. The regulation is based on the assumption that travel abroad by American Communists would be

harmful to the interests of the United States. [11] It would strengthen the hand of the Soviet Union, we may speculate, by facilitating the receipt of funds, political instruction, or propaganda techniques by the American travelers, or, we may speculate, it would facilitate the exchange of information or instructions concerning espionage and sabotage activities. Whatever the danger was seen to be, it was certainly seen as injuring the national security or foreign policy of the United States, for that is what the history of the world has been all about for the last thirty-five years.

The Kent and Dayton opinions explicitly support our argument. Dissent-

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[11] Congress expressly so found in the Internal Security Act of 1950, ch. 1024, Title I, §2, 64 Stat. 987, codified at 50 U.S.C. §781(8) and (15). In light of those findings, Kent and Dayton cannot be dismissed as merely concerning "beliefs and associations."

ing in Kent, Mr. Justice Clark describes the majority opinion as "holding that the Secretary has not been authorized to deny a passport to a Communist whose travel abroad would be inimical to our national security" (357 U.S. at 137); he believes that "Congress meant the Secretary to deny passports to those whose travel abroad would be contrary to our national security" (id. at 132); he cites legislative history which refers to "means which may be adopted by hostile nations to secure military information or spread propaganda and discontent" (id. at 133); he asserts that to allow the Secretary "to exercise his traditional passport function...would effectively add to the protection of this country's internal security" (id. at 135); he cites legislative history which supports the Secretary's power "to block travel to

and from the country by those persons whose passage would not be in the best interests and security of the United States" (id. at 136), which refers to "espionage and subversive activities" (ibid.), and which states that "passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States" (id. at 139); and he alludes to "other evidence of peacetime denials for security reasons". (id. at 140).

It blinks reality to say that the regulation in the Kent case involved anything else but the "national security or foreign policy of the United States."[12/]

[12/] The government asserts (Br. 33 n.26) that the majority in Kent held that "there was no nexus between mere
(footnote cont'd next page)

Dayton provides still further support for the irresistible conclusion that Sec. 51.135 involved national security or foreign policy. The government's brief in Dayton before this Court stated (p. 44) that the objective of Sec. 51.135 was "to prevent the departure and entry of citizens when such departure or entry is reasonably likely to be inimical to the national safety in times of peril." Dayton's passport was refused based on findings that he was "part of the Rosenberg espionage ring and...presen[t] at an apartment...which was allegedly used for

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(footnote cont'd from previous page)
communistic beliefs and harm to national security. Id. at 128." Kent, of course, held no such thing. At the passage cited, Kent declined to equate the dangers posed by travel of Communists abroad with the dangers posed to the nation in time of war. But it did not hold that travel of Communists abroad had no affect on national security or foreign policy; Dayton is squarely contra to that proposition.

microfilming material obtained for the use of a foreign government." 357 U.S. at 146, 152. Yet the Court held that these findings of involvement in crime for which the Rosenbergs had been convicted "show only a denial of a passport for reasons which we have today held to be impermissible." Id. at 150.

Clearly, the Kent-Dayton regulation had the very same purpose as does §51.70(b)(4). That regulation having been held unauthorized in Kent, and Congress not having adopted any explicit authorizing legislation since then, the Court must conclude that §51.70(b)(4) is as unauthorized today as the indistinguishable Sec. 51.135 was twenty-three years ago.

C. The Administrative Practice Involving Denial of Passports For National Security Or Foreign Policy Reasons Is Too Insubstantial And Inconsistent To Support A Conclusion That Congress Has Implicitly Authorized The Practice.

Kent and Zemel hold that implicit Congressional authorization to prohibit the constitutional right to travel can be found only where there is a substantial and consistent history of actual imposition of the restrictions on travel sought to be justified in any particular case. In the case at bar, therefore, unless the Court finds such a substantial and consistent history of the denial of passports by the Secretary of State based upon "activities abroad [which] are causing or are likely to cause serious damage to the national security or foreign policy of the United States," the revocation of Mr. Agee's passport, and the denial of his constitutional right to travel,

must be held invalid. Cf. FMC v. Seatrain Lines, Inc., 411 U.S. 726, 746 (1973).

The government's entire case for showing a substantial and consistent practice rests on the following events: a 1906 denial of a passport to a citizen who became a notorious promoter of gambling and prostitution in China (Br. 29); a 1907 denial of a passport to a citizen in Cairo who "was engaged in blackmailing projects, and was disturbing or endeavoring to disturb the relations of this country with the representatives of foreign countries" (Br. 30); a 1917 denial of passports to several Socialists who intended to attend a "quasi-official conference" in Stockholm (Br. 30); a 1921 denial of a passport to a parolee on grounds of

"international comity" (Br. 30); a 1948 denial of a passport to a Congressman going abroad to attend a conference on an ongoing Greek rebellion (Br. 39); a 1954 revocation of the passport of an American gun runner (Br. 39); and a 1970 revocation of the passports of two citizens intending to travel to the site of an international hijacking (Br. 39).

In addition, the government presumes also to rely (Br. 40 n.30) on "57 passports revoked or denied in 1956 because passport holder had engaged in either 'illegal activities or activities prejudicial to the orderly conduct of foreign relations.'" Those are very dubious and necessarily useless figures. A more descriptive tabulation of 1956 passport refusals states that ten were refused to "Participants in political affairs abroad whose activities were

deemed harmful to good relations and persons whose previous conduct abroad has been such as to bring discredit on the United States and cause difficulty for other Americans (gave bad checks, left unpaid debts, had difficulty with police, etc.)". The Right to Travel: Hearing on S. Res. 49 Before The Senate Sub-Committee on Constitutional Rights, 85th Congress, 2nd Sess. 129 (1958). The discrepancy in the figures between the two reports, their unilluminating descriptions, and their admixture of illegal, political and foreign policy categories make both sources useless as the basis for a decision to impair constitutional rights. 13/

13/ Though the government's brief refers to "57 passports revoked or denied in 1956," the source cited by the government refers to 1957, and alludes to 61, not 57, revocations or denials. But the uselessness of the 1957 data is the same (footnote cont'd on next page)

On the basis of essentially the same materials, the Court of Appeals concluded that "such evidence hardly amounts to a "substantial and consistent administrative practice...". Pet. App. 13a-14a & n.7. As to the summary figures presented concerning refusals in 1955 and 1956 (Govt. Br. at 40 n.30), the Court of Appeals held that "the rationale for these passport denials, however, appears only tenuously related to 22 C.F.R. §51.70(b)(4)'s concern with 'serious damage to the national security or the foreign policy of the United

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as the 1956 data since the 61 cases include two very different kinds, those "deemed illegal" and those "prejudicial to the orderly conduct of foreign relations," with no further description.

States'". Pet. App. 13a n.7. 14/

The Court of Appeals decision can be affirmed without even looking beneath the surface of the government's seven examples which might charitably be said to have some relation to Sec. 50.70(b)(4). It is simply an exaggeration for the government seriously to contend that those seven examples across a span of seventy six years supply the necessary "substantial and consistent" practice which this Court demands, especially when the Court also requires a narrow construction of the Secretary's power

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14/ Insofar as the Court agrees with our analysis, supra Point IB, that the regulation involved in Kent and Dayton is indistinguishable from §51.70(b)(4), and given the Court's conclusion in Kent that the history of the administrative practice was insufficient to support a finding of implicit Congressional authorization for that regulation, all pre-Kent practices are irrelevant to a decision on authorization in the case at bar.

where a constitutional right is at stake. Kent, supra; see also Schneider v. Smith, 390 U.S. 17 (1968), and cases cited therein.

Looking a bit more closely at some of the government's seven examples shows how worthless they actually are. It also shows how dangerous to liberty it would be to allow the Secretary of State to exercise the overbroad power asserted in Sec. 50.70(b)(4).

The first two examples of course have no reference at all to serious damage to national security or foreign policy. They both involve run-of-the-mill illegal conduct, found in Kent to be a valid basis for refusal of a passport, as is made clear in a memorandum concerning the 1906 Brown case sent by the Third Assistant Secretary of State, Huntington Wilson, to the Consul-General

in Egypt who refused Waldberg's passport application in 1907:

> If the passport is desired to accomplish a criminal purpose, it would be properly refused....If a passport were in itself a certificate of citizenship, and if the inability to produce a passport carried with it the loss of protection, it might well be argued that Brown is entitled to a passport irrespective of his conduct, misconduct, or the interests of the United States. If, however, protection is not dependent upon passport, but that in a proper case an American citizen in a foreign land will be protected, it follows that the existence or nonexistence of a passport does not affect the status of the person without it in his relation to the home government.

1907 Foreign Relations of the United States, Pt.2, at 1080. Both the 1906 and the 1907 denials were based on the Department's unwillingness "to give a letter of introduction and request good offices" for those engaged in notorious violations of foreign laws. Id. at 1076-1080. In both cases, the Department determined before approving the denials that a passport was not legally or practically necessary to the applicant's protection or continued residence abroad. Id. In other words, while the

Department was unwilling "to make itself a party to such misconduct" in the 1906 and 1907 instances, it was not willing to, and did not, impose actual travel controls. These early examples thus do not provide support for the actions taken here since, as petitioner points out, respondent's continued residence abroad may well depend upon his possession of a passport. Br. 53. See infra at 48-49 (discussing 1899 case where passports not denied where required for continued residence abroad).[15/]

15/ Petitioner bases its discussion of the 1906 and 1907 examples on published State Department documents. Information on the other cited cases, however, is largely derived from news accounts and law review articles written long after the events in question. Petitioner claims that it failed to maintain records of its passport practices. Respondent, and this Court, are hampered by this lack of reliable evidence. It is also unlikely that Congress can have ratified a practice so amorphous that its history is non-existent.

The government's third case, involving the 1917 denial of passports to a group of Socialists, was justified at the time as involving a violation of the Logan Act, a criminal statute (Govt. Br. 30). Though the Logan Act does involve foreign policy, it is a specific criminal statute which would bring it within the Kent doctrine regarding authorization of passport refusal based on criminal activity.[15a/]

The 1921 passport denial (Br. 30) involved not national security but paroled criminals, and is clearly labeled by Hackworth as such. G. Hackworth, 3 Digest of International Law 504 (1942).

Petitioner also cites the 1948 denial of a passport to Rep. Leo Isacson as support-

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15a/ Although petitioner correctly points out that passports were required for entry and exit during World War I, it cannot point to any specific passport denial or revocations on national security grounds during that or any other war.

ing its present claims (Br. 43). Rep. Isacson did have some difficulty in obtaining a passport in April of 1948. However, as he later reported to the House, he was able to secure a passport on April 23, 1948.

> After some difficulties with our State Department which resented my outspoken criticism of their betrayal of Israel, my passport was finally issued on April 23.
>
> 94 Cong. Rec. A5182 (1948).

The 1954 revocation of Col. Herbert Julian's passport (Br. 39) followed a similar pattern. Col. Julian received a new passport on July 2, 1954, only fifteen days after the revocation and after he had threatened legal action. New York Times, July 12, 1954, p.2. We are left with the single instance in 1970 where two citizens' passports were revoked on the authority of the same regulation as is in issue here and for purposes related

to national security and foreign policy.[16/]

We concede that the 1970 case is unambiguous. We deny, however, that a single, unambiguous refusal of a passport on national security or foreign policy grounds in 202 years is a "substantial and consistent" practice.

Though Kent and Zemel are explicit that it is the actual exercise of power over passports by the Secretary, rather than the mere expression of the power, which determines useable administrative practices (357 U.S. at 127, 381 U.S. at 11),[17/] the government

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16/Plaintiffs were denied a temporary restraining order, and an emergency appeal to the Court of Appeals that same day was summarily dismissed. See Sirhan v. Rogers, diss'g. appeal No. 35364 (Sept. 11, 1970). Petitioner's reference (Br. 39) to affirmance by the Second Circuit is in error. A stipulation of dismissal without prejudice was entered on October 28, 1970, in the district court.

17/The Court of Appeals recognized that standard as controlling here. Pet. App. 15a.

also proffers to the Court self-serving opinions, Executive Orders, consular regulations, instructions, bulletins and regulations (Br. 26-28, 36-38), to buttress its otherwise flimsy case. The fact is, however, that respondent can show at least as many expressions of Executive opinion which renounce the power exercised here over Mr. Agee as the government can in support of that power.

Petitioner cites, for example, the opinions of Attorneys-General Hoar (1869) and Knox (1901) for the general proposition that passport issuance is a discretionary function. (Br. 27). Arrayed against the Hoar and Knox opinions, however, are the opinions of Taft, 15 Op. Attn'y Gen. 114, 117 (1876), Brewster, 17 Op. Attn'y Gen. 674 (1884), and Akerman, 13 Op. Attn'y Gen. 397, 398 (1871), which all support the view that passports are to be granted upon conclusive proof of citizenship. The State Department's own view of its discretion under the 1856 Act was ex-

pressed by Secretary of State Fish in 1875:

> I am of the opinion that any citizen of the United States has a right to be furnished with such evidence of citizenship, and of his right to the protection of his Government, as has been adopted for that purpose, upon complying with the usual regulations, and that the necessity therefore is a matter for the judgment of the party himself. A passport duly issued is the usual evidence of citizenship in a foreign land.
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> Wharton, International Law Digest 465 (1886). See also Dept. of State, The United States Passport 141, 143 (1976); Dept. of State, Papers Relating to the Foreign Relations of the United States, 728 (1914)(Supp.)

In 1899 a consul at Chefoo, China inquired of a legation official in Peking as to whether he could refuse to issue passports to two "lewd" and "disreputable" women residing indefinitely in Port Arthur, which was then under Russian, not Chinese, jurisdiction. See 1899 Foreign Relations of the United States 185. The legation official authorized the refusal, but that order was overruled by Acting Secretary of State Adee (id. at 186-187):

While the statute vests in the Secretary of State the discretion to issue passports to citizens of the United States, which discretion has been delegated under appropriate regulations to the agents of this Department in foreign countries, the exercise of that discretion has been generally confined to requiring full establishment of the citizenship of applicants and of their conservation, in good faith, of the character of citizenship, to the end that the statute may be obeyed and that passports may issue to none but citizens. Their conduct or deportment has not been made the subject of discretionary regulation so far as the granting of passports is concerned. Their acts, if wrongful, are matters for the cognizance of the law of the place of their sojourn, or of the law of the United States, if any statute be applicable to their case. Even when accused of crime or offense in a foreign land, a citizen of the United States would be entitled, in case of need, to such certification of his status as a passport affords. There have been instances in the past where the Department has exercised its discretion to the extent of directing the refusal of passports to those whose conduct in another country was violative of the laws of the United States, as when, several years ago, passports were ordered to be denied to emissaries of the then polygamous Mormon sect who

were seeking to make proselytes in Germany, but such instances have been rare, and this course could obviously only be pursued under distinct warrant of law.

* * * * * * * *

The Department would not hold itself authorized to prescribe any conditions or qualifications of title to claim a citizen's passport other than those prescribed by law. Unless the refusal of a passport can be predicated on authority of law or of diplomatic instructions and regulations made pursuant to law, a passport may not be withheld from a bona fide citizen.

The foregoing considerations make me hesitate to sanction the action you report lest it might be found to work deprivation of rights of citizenship otherwise than in pursuance of judicial course, and so inflict a penalty without the jurisdiction to try and sentence.

In a 1929 cable to the Consul-General in Warsaw, the Department of State reaffirmed its adherence to the policies expressed in 1899 by Secretary Adee:

> The conduct or deportment of an applicant has not been made the subject of discretionary regulations...If a person has committed a wrongful act, it is the view of the Department that it is a matter for the cognizance of the law of the place of their sojourn abroad, or, if in the United States, or

> the law of this country. Even when accused of a crime or offense in a foreign country, a citizen of the United States would be entitled to certification of his status as an American citizen.
> G. Hackworth, supra, at 502.

This policy was reiterated by a State Department letter of April 30, 1932:

> The Department has for many years taken the position that the conduct or deportment of an applicant for a passport should not, as a rule, be considered a justification for the refusal to issue such a document. It feels that the issue of an American passport should, so far as practicable, be conditioned solely upon the applicant's submitting to it appropriate documentary evidence that he is an American citizen. It is not believed that the Department should deviate from this long established policy. To do so, as suggested by Mr. Colden, would only result in placing upon the great preponderence of bona fide applicants for passports undue inconvenience, expense and delay in order to detect an infinitesimally small percentage of cases involving apparent bad faith, the merits of which cases could only be determined finally by resort to judicial proceedings.
>
> Ms. Department of State, file 251.11 Georgescu Constantine.
> G. Hackworth, supra, at 500.

The Secretary's lack of authority became even clearer as hearings progressed on the various post-Kent proposals introduced in Congress. Deputy Under Secretary of State Robert Murphy told a Senate Committee that

> [t]he Executive branch is convinced that our national security is threatened by the free issuance of passports to American supporters of the international Communist movement who wish to travel abroad. Without Congressional authority we cannot deny such passports.
>
> Hearings on Passport Legislation Before the Senate Foreign Relations Committee, 85th Cong., 2d Sess. 24 (1958).

Murphy further stated that the need for passport legislation was "urgent" because, under existing statutory authority, the Secretary had "no right and no ground to do other than to issue passports" to individuals going abroad "to aid the international Communist movement" -- and thus, under express Congressional findings, [18] to harm the

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[18] See Internal Security Act of 1950, 50 U.S.C. §781(8), (9), and (15).

national security. Id. at 21. Had the Court in Kent and Dayton not held national security regulations in existence then unauthorized, there would have been authority for the denials Murphy urged.

This was also the position taken by President Eisenhower in his July 7, 1958 message to Congress:

> In recent years the Secretary of State has based his limitation of passports on two general grounds. The first of these has been that an applicant's travel, usually to a specific country or countries, was inimical to United States foreign relations. The second of the general grounds of denial has been that the applicant is a member of the Communist Party; is under Communist Party discipline, domination, or control; or that the applicant is traveling abroad to assist knowingly the International Communist Movement.
>
> Recently the Supreme Court limited this power to deny passports under existing law. It is essential that the government today have power to deny passports where their possession would seriously impair the conduct of the foreign relations of the

> United States or would be inimical to the security of the United States.
>
> Public Papers of the Presidents, Dwight D. Eisenhower, 1958, ¶161.

In hearings the following year, Murphy again stated that "[t]he critical problem of the moment, however, is to remedy the total lack of legislative authority to deny passports to really dangerous participants of the international Communist conspiracy." Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 53 (1959). Murphy also testified (id. at 59) that the Attorney General

> agrees with us that our most urgent current problem in the passport field is the lack of Congressional authority to deny passports to those persons in situations where information establishes that their travel abroad would constitute a real danger to the United States...We seek only the means to protect the United States by denying passports to those relatively few citizens who are knowingly engaged in the activities of the Communist conspiracy and whose

> travel abroad would thus be likely to impair the security of the United States.

Mr. Murphy similarly stressed the State Department's lack of authority in House Committee hearings:

> It should be emphasized that there is presently no Congressional authorization enabling the Department to deny passports to any member of the Communist Party, U.S.A. Any or all of them, those who have not already done so, could come in tomorrow and receive their passports merely by demonstrating their citizenship, except in the unusual case where they might also be a fugitive from justice or a law violator. Thus, a major aspect of the present danger is the total effect on the orderly conduct of our foreign policy and our national security involved in the completely unrestricted travel of as many proponents of the Communist conspiracy as it determines to have travel.

Hearings on Providing Standards for the Issuance of Passports and for Other Purposes Before the House Committee on Foreign Affairs, 86th Cong., 1st Sess. 46 (1959).

The Eisenhower and Murphy statements

flatly contradict the government's claim (Br. 44) that, after Kent, "the Executive Branch sought [only] congressional clarification of its authority." Obviously, it was seeking the authority itself, at least if the President of the United States and its Under Secretary of State are to be believed.

None of the post-Kent proposals was enacted by Congress.

Following President Kennedy's assassination, the State Department's passport policies were scrutinized by both Congress and the Warren Commission, because Lee Harvey Oswald had been issued two passports after his attempt to defect to Russia in 1959. Frances Knight, Director of the Passport Office, told the Commission that passports were regularly issued

> to individuals whose activities and past record of behavior are patently more detrimental to the security and best interests of the United States than any re-

> port or any record that we had in the file of Lee Harvey Oswald.

5 Hearings Before the President's Commission to Investigate the Assassination of President Kennedy 381 (1964). Ms. Knight further stated that the passport office had "no such authority" and was "not in a position" to determine "the good or bad behavior of United States citizens here or abroad." Id. at 378.

Similarly, in 1965 House appropriations hearings, a State Department spokesman stated that that agency "had no authority, no jurisdiction or responsibility" to evaluate passport applicants on national security grounds. Hearings on Appropriations for the Department of State for 1966, House Committee on Appropriations, 89th Cong., 1st Sess. 368 (1965) (Testimony of William Crockett, Deputy Under Secretary for Administration, Bureau of Security and Consular Affairs). The only instance where the State Department would "make an evaluation of anybody" would occur

in connection with potential employment. Id. at 369.

In summary, the history shows a handful of peacetime refusals of passports, virtually all of which involved criminal activity; recognition by the highest government officials after Kent that the Secretary of State had no power to refuse passports for reason of national security or foreign policy; and in the twenty two years since Kent -- a period of relentless foreign crisis including the Cold War, Berlin, Cuba and Vietnam -- only a single case of passport refusal (apart from the case at bar) on national security or foreign policy grounds (Govt. Br. 39). With that history behind it, Congress could not rationally be said, in either 1926, 1952, or 1978, to have ratified a "substantial and consistent" practice of passport refusals on national security or foreign policy grounds.

D. The History Of Travel Control Confirms That Congress Has Not Granted The Executive Authority To Impede The Travel Of A Citizen Whose Travels Abroad Are Allegedly A Threat To National Security Or Foreign Policy Interests.

Congressional authorization of direct infringements on the right to travel will not be "readily inferred," Kent at 129, and delegated powers that curtail or dilute the right to travel will be "construed narrowly." Id.[19/] Because there is no explicit legislative explanation of §211a, the Court has held that the primary evidence of Congressional intent in this field is Congressional knowledge and approval of administrative practice. Kent at 128, Zemel at 18. As we have shown, the administrative practice does not support the

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19/The Court has regularly held that executive actions curtailing individual liberties are not permitted in the absence of clear Congressional authorization. See, e.g., Gutknecht v. United States, 396 U.S. 295 (1970); NLRB v. Fruit and Vegetable Packers, 377 U.S. 58 (1964); Greene v. McElroy, 360 U.S. 474 (1959); Duncan v. Kahanamoku, 327 U.S. 308 (1946); Ex Parte Endo, 323 U.S. 283, 300 (1944).

Secretary here.

To the extent that the Court looks beyond the administrative practice, as the Secretary invites it to do, it can only conclude that Congress has steadily refused to provide or approve the authority here invoked. The history of passport and travel controls, especially the discussions surrounding the legislative enactments in 1856, 1918, 1926, 1952, and 1978, demonstrates that the executive does not have national security travel control authority. The historical evidence supporting this conclusion is so strong that even Justice Clark's reading of the legislative history for four dissenting Justices in Kent supports respondent.

Because that history is quite lengthy, we summarize its salient points. First, since passports were not necessary for lawful travel abroad, the provision of authority to the Secretary of State in 1856 "to grant and issue passports" was not intended to, and did not, affect the right to travel.

Congress imposed only one condition -- springing from the very nature of the passport -- namely, that the applicant be a citizen of the United States. Consequently, passports were invariably given to citizens in peacetime as a matter of right, as Attorneys-General Ackerman and Taft and Secretarys of State Fish and Adee specifically noted.

In 1918, Congress enacted a travel control statute, after a debate in which it was agreed that only the wartime emergency justified abrogation of the right to travel. Attempts in 1920 to amend the Passport Act to require a passport for peacetime travel as part of a revenue measure, successful in the Senate, were overwhelmingly defeated in the House when it became apparent that the effect of requiring a passport might be to permit the Secretary to control travel as well. Enactment of the 1926 Passport Act must be read in light of Congressional understanding, clearly expressed in 1920, that the

limited discretion to "grant and issue passports" provided no authority to confine an individual to the United States.

Subsequent measures in 1941 and 1952, requiring passports during the war and Cold War emergency, were understood to be inapplicable in peacetime when enacted, and this Court held in Kent and Dayton that the 1952 measure did not grant the authority exercised there, and claimed here. Moreover, even if the 1926 and 1952 Acts could be construed to authorize travel control during a prolonged peacetime emergency, a construction urged by the dissent in Kent but rejected by the Court, they would still not provide the authority sought by petitioner, for Congress has repealed the provision requiring passports for travel during such emergencies. The 1978 measure generally requiring passports for travel was passed solely "to facilitate travel"; there is no indication at all of any Congressional intention to authorize travel control in 1978.

1. The Early History

During most of the history of this nation, Americans could travel without hindrance. "In time of peace a law-abiding American citizen has always been free to leave the country without the permission of the Government." 20/ Persons confined in prison or released upon bond, pending trial or appeal, were an exception to the general rule. Early in its history, the United States developed the practice of issuing passports but not with the object of controlling travel. 21/ They were issued not only by the Secretary of State but also by state and municipal authorities as certificates of identity. 22/

20/Department of State, The American Passport 3-4 (1898) (hereinafter The American Passport).

21/Reorganization of the Passport Functions of the Department of State, Senate Committee on Government Operations, 86th Cong., 2d Sess. 20 (1960) (Comm. Print).

22/The American Passport at 37-42.

To remedy abuses arising from the variety of different passports various jurisdictions had issued, Congress enacted in 1856 a measure to provide a statutory basis for issuing passports, and vesting that exclusive power in the Secretary of State. In its original form, the 1856 Act provided, in relevant part:

> That the Secretary of State shall be authorized to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe.... 23/

Congress explicitly imposed upon the right to a passport only one substantive condition, springing from the very nature of the passport -- namely that the applicant be a

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23/11 Stat. 60 (1856), amended in 1866 (14 Stat. 54), in 1875 (Rev. Stat. §4075), in 1902 (32 Stat. 386), and in 1926 (44 Stat. 657), in respects not material to this discussion. It is now codified at 22 U.S.C. §211a.

citizen of the United States. 24/

Nothing in the 1856 Act authorized the Secretary of State to deny passports on national security grounds or to revoke passports for any reason, and the Secretary has not pointed to any evidence suggesting that Congress intended implicitly to authorize such power. Since passports were not necessary for lawful travel abroad, the act was not intended to, and did not, affect the right to travel. 25/ Senator Seward described the bill as a "convenience to Americans abroad." Cong. Globe, 34th Cong., 1st Sess. 1797 (1856). As

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24/See generally Boudin, The Constitutional Right to Travel, 56 Columbia L.Rev. 47,53 (1956); Stowell, The Legal Adviser of the Department of State, 5 International Law and Relations 1,11 (1936); Webster, A Treatise on the Law of Citizenship in the United States 302 (1891).

25/See the General Instructions in Regard to Passports, September 1, 1873: "Citizens of the United States visiting foreign countries are liable to serious inconvenience if unprovided with authentic proof of their national character. The best safeguard is a passport from this Department, certifying the bearer to be a citizen of the United
(footnote cont'd on next page)

we have shown, this construction was explicitly recognized by Attorneys-General Ackerman and Taft, Acting Secretary of State Adee, and Secretary of State Fish during the latter part of the nineteenth century. 26/ See supra at 47-50.

(footnote cont'd from previous page)

States. Passports are issued only to citizens of the United States upon application supported by proof of citizenship." The American Passport at 54.

26/Petitioner's citation (Br. 27) to differing opinions by Attorney General Knox in 1901 is not persuasive, both because Knox's statement makes clear that he was referring to discretion to deny passports to "one of the criminal class," 23 Op. Att'y Gen. 509, 511 (1901), and also because Secretarys of State, not Attorneys-General, are charged with enforcing the Passport Act. Moreover, in evaluating pre-1918 assertions of authority to deny passports, it is important to recall that a passport was then a convenience, not a necessity for travel. Even granting the Department some discretion in determining whether to facilitate a citizen's travel, it would not follow that it may deny a passport where the purpose and effect is to confine him to the United States. The Court has repeatedly treated the refusal by government to facilitate a right very differently indeed from denial of the right itself.

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2. The 1918 Act

The Court has held that the "restrictive regulations" of wartime cannot be relied on to support petitioner's claim of peacetime travel control authority. Kent, at 128. 27/ We address the 1918 experience nevertheless because in fact it strongly tends in the other direction -- that is, it supports respondent's claim that Congress believed the 1856 Passport Act had not authorized the power sought here, and that the 1926 Congress intended neither to grant such authority nor to ratify its prior imposition.

(footnote cont'd from previous page) Compare Harris v. MacRae, 65 L.Ed.2d 784 (1980) with Roe v. Wade, 410 U.S. 113 (1973). In Kent, the Court held that denial of a passport, in light of modern conditions, is denial of the right to travel.

27/Nearly all of the area control examples canvassed in Zemel took place while the United States was not at war. See Zemel at 9-11.

In 1918 Congress enacted a statute which made it unlawful -- during wartime and after Presidential proclamation -- for any American citizen to enter or depart from the United States without a valid passport. Act of May 22, 1918, ch. 81, §10, 40 Stat. 559. The House Report accompanying the bill expressly notes that the executive had no pre-existing power, either inherent or from the 1856 Act, to control travel even to war areas: "new legislation is the only remedy." House Committee on Foreign Affairs, Control of Travel From and Into the United States, H. Rep. 485, 65th Cong., 2d Sess. 2 (1918). President Wilson's proclamation triggering the act marked only the second time in American history that passports had been required for entry and exit. 28/ The sponsor

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28/During the latter part of the War of 1812 passports were only required for travel to enemy territory. Act of Feb. 4, 1815, c. 31, §10, 3 Stat. 199. During the Civil War a passport was required "to go abroad from a port
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of the legislation in the House, Rep. Flood, argued that the measure was urgently needed to curb wartime espionage and that any discretion granted would lapse when the war ended.

> When the war ends the regulations will end. There is no necessity of any passport in time of peace. Our law authorizes passports, but they are for the protection of the citizens who get the passports, who ask for them.
>
> We are asking for the passage of this law in order to protect the government and the country. Mr. Speaker, we have rules and regulations of the Department of State to control the travel to and from the country of American citizens, friendly aliens, and neutrals, but the rules and regulations go beyond the law and if there was a test made of them they could not be upheld.
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> 56 Cong. Rec. 6066-6067 (1918).

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of" or "to land in" the United States. The American Passport 50 (1898). According to the State Dept., these wartime cases "are exceptional....They need not enter into a correct defining of the regular American passport, a document sanctioned by more than a century of issuance and authorized by statute. In its wording this passport has not varied materially and in its purpose it has not varied at all." Id. at 4. That purpose was to ensure to the citizen "free passage." Id.

The authority granted in 1918 was intended to, and did, end with the coming of formal peace in 1921. See Act of March 3, 1921, c. 136, 41 Stat. 1359 (formal declaration of peace).

The State Department did not relinquish its wartime authority without a struggle. In 1919 the President and the Secretary of State urged Congress to enact legislation temporarily continuing for one year after a formal peace treaty the passport requirement for entry into the United States. See H.R. 9782, 66th Cong., 1st Sess.; 58 Cong. Rec. 7301 (1919). Rep. Linthicum, a supporter of such restrictions, stated his belief that the measure would prevent return of American citizens who had been abroad during the war and had "gone wrong" and had "become socialists or anarchists or disturbers...." Id. at 6974. The House Committee on Foreign Affairs, however, expressly deleted from the bill any peacetime travel controls. Id. at 6971 (remarks of Rep. Rogers).

H.R. 9782, as passed, continued travel controls over aliens, but not over American citizens. See Act of Nov. 10, 1919, ch. 104, 41 Stat. 353. As a leading supporter of the bill, Representative Connally said just before passage of the bill (58 Cong. Rec. 6976), "Americans should have the unrestricted right to [travel] without the requirement of passports." It is clear, then, that the 1919 Congress understood that the general language of the 1856 Act granted no authority to the executive to impose travel controls.

In one of a series of post-war attempts to raise governmental revenues, the Senate in 1920 attempted to amend the State Department appropriations bill already passed by the House (H.R. 11960) to raise passport fees. Because the measure would not raise revenue unless passports were a necessity, the Senate added a permanent passport requirement for peacetime travel without apparent notice of right-to-travel consequences. See 59 Cong. Rec. 7166 (remarks of Rep. Connally). The

House was angered by the travel restrictions the Senate had unwittingly countenanced, see generally 59 Cong. Rec. 7124, 7166-7175 (House), 7190-7191 (Senate), and the Senate amendment was decisively rejected after considerable debate. 29/ The House was "unwilling to enact a solemn law that makes the coming and going of a citizen -- a free man in a free country -- from or to his own home land in time of peace contingent upon the consent of some bureau of government." Id. at 7166 (remarks of Rep. Connally); see also id at 7167 (remarks of Rep. Siegel). The conference report (H. Rep. 985, 66th Cong., 2nd Sess.) containing the Senate amendment was rejected by a vote of 194 to 97, id. at 7175, and the 1920 appropriations bill was enacted without the travel control amendment. Id. at 7748-50; Act of June 4, 1920, ch. 223, 41 Stat. 739.

29/ National security considerations were raised. See, e.g., 59 Cong. Rec. 7173 (remarks of Rep. Begg)("the Government...has the right to--footnote cont'd on next page--

3. The 1926 Act.

Congress again turned its attention to passports in 1926. The existing passport law -- the 1856 statute, which merely authorized the Secretary to issue passports on the single condition of citizenship, and was clearly understood not to authorize national security travel controls -- was re-enacted with minor changes aimed primarily at enlarging the number of American diplomats who could issue passports. The 1926 measure was described on the floor, and by the State Department in committee hearings, as a convenience to foreign travelers. See 67 Cong. Rec. 11705 (1926); Hearings on Validity of Passports Before the House Committee on Foreign Affairs, 69th Cong., 1st Sess. (1926) (testimony of Asst. Secretary of State Wilbur Carr).

(footnote cont'd from previous page) exercise control of the man...who wants to travel abroad); id at 9407 (remarks of Rep. Flood) (urging travel control of individuals "liable by some action of theirs to involve this government in trouble....")

The Secretary concedes that the 1926 Act was intended to re-enact existing law, but nevertheless concludes that Congress must be taken to have authorized travel controls. To the contrary, if anything was clear in 1926, it was (1) that the 1856 Act had never been understood to authorize travel controls, 30/ (2) that Congress intended in 1918 to pass an emergency wartime measure that would terminate when the war was over, and (3) that three times in recent years (1918, 1919, and 1920) Congress had rejected administration-sponsored attempts to authorize peacetime travel controls, after debates focusing on the importance of safeguarding the right to travel. It would

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30/Even those who argued that the 1856 Act provided discretionary control over passports, a position never asserted till 1901 and one we have challenged supra, conceded that the Secretary had no power to impede travel. See, e.g., Committee on Foreign Affairs, Hearings on Extension of Passport Control, H.J. Res. 205 and H.R. 9782, 66th Cong., 1st Sess. 38-39 (1919)(testimony of Wilbur J. Carr).

be extraordinary if those recent assertions of Congressional solicitude for the right to travel were ignored in 1926, and nothing in the legislative history, certainly not the petitioner's references (Br. 35), suggests that Congress had reversed itself on so important an issue. To the contrary, the 1926 Passport Act takes its meaning directly from the debates of 1918, 1919, and 1920, and must be understood in the context of a Congress hostile to executive attempts to control the peacetime travel of American citizens.

4. The 1941 Act

In 1941 the executive sought legislation to amend the 1918 Travel Act to require passports for entry and exit during the existing national emergency, proclaimed by the President on May 27, 1941. As in 1918, the measure was depicted as emergency legislation required to combat espionage. Senator Van Nuys, Chairman of the Senate Judiciary Committee and sponsor

of the bill, stated that the measure "would apply to Americans; but the main objective is to reach certain elements of aliens." 87 Cong. Rec. 5325 (1941).

Again, the debate reflected with clarity the Congressional understanding that the 1926 Passport Act granted the executive no power to impose travel controls. See, e.g., 87 Cong. Rec. 5050 (remarks of Rep. Jonkman). 31/

In a successful attempt to limit the discretion sought by the President, Senator Taft proposed that the provision which allowed passport restrictions in the event of war between any two nations be limited to travel restrictions on aliens, and that restrictions on the travel of American citizens be authorized only during wartime or the existing

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31/The relevant portions of §211a have not changed since 1941, when Congress debated the war measure. Therefore, unless Congress has subsequently authorized peacetime travel controls -- and, as we show below, Congress has had no such intention -- the 1941 history, like the 1918, 1919, 1920, and 1926 history, conclusively establishes the petitioner's lack of authority here.

national emergency. 87 Cong. Rec. 5387 (1941). See also id. at 5387-5388 (remarks of Sen. Norris).

The Taft Amendment was adopted unanimously. Id.

As in 1918, therefore, Congress in 1941 was only willing to authorize travel control because of the pressing exigencies of world war and only on the condition that controls end when emergency conditions abated.

5. Post War Developments

In 1952 Congress repealed the 1918 Travel Act (as amended in 1941) and reenacted it to provide that a passport be required for entry and exit during "any national emergency proclaimed by the President..." 66 Stat. 190 (1952). That act, passed during the Korean War, simply continued the succession of wartime author-

izations.[32/] The Court in Kent and Dayton canvassed the legislative history and concluded that nothing in the 1952 Act, nor previously in §211a nor §1185(b), authorized peacetime national security denials or revocations.

Because the decisions in Kent and Dayton had so plainly held national security denials or revocations unauthorized, see

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32/ Petitioner's broad construction of the 1952 Act, rejected in Kent, is based largely on his contention (Br. 41-42) that in 1952 Congress "instructed the Director of [the Passport Office] 'to maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and Central Intelligence Agency...for the purpose of obtaining and exchanging information for use in enforcing the provisions of this Act in the interest of the internal security of the United States'," quoting 8 U.S.C. §1105. That argument is either extraordinarily careless or a deliberate attempt to mislead the Court. Section 1105 was intended solely "to strengthen security screening of aliens coming to the United States, or residing therein, by providing a continuous flow of information between agencies...charged with the administration of immigration and naturalization laws...,"

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Point IB, supra, Congress was immediately urged to reconsider the subject of passports. We have previously canvassed the post-Kent history briefly to demonstrate the administrative understanding of and acquiescence in those decisions. Here, we review post-Kent legislative activities because the hearings and floor debates reveal a clear Congressional opinion that the Secretary did not possess the authority to deny or revoke passports on national security grounds, as the Court had held, and a clear refusal to grant the authority so strenuously sought.

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and confers authority not on the Director of the Passport Office, but rather on the Commissioner of the Immigration and Naturalization Service and the Administrator of the Bureau of Security and Consular Affairs. Conf. Rep. 2096, 82nd Cong., 2d Sess., reprinted in 1952 U.S. Code Cong. and Adm. News 1688.

The legislative history begins, of course, with President Eisenhower's Special Message, which did not seek ratification of a power claimed, but rather grant of a power admittedly not possessed. See Public Papers of the Presidents, Dwight D. Eisenhower, 1958, §161, quoted supra at 47-48.[33/] On July 10, 1958, Senator Eastland, Chairman of the Judiciary Committee, stated that Kent and Dayton had "destroyed the right of the Secretary of State to use his discretion in the issuance of passports for the purpose

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33/ Although petitioner argues that the failure of Congress to take action after Kent and Dayton is irrelevant (Br. 44-46), President Eisenhower's personal intercession and his express warning that he possessed no power to revoke passports on national security grounds makes this case far different from the scenario petitioner describes, under which the administration claimed power and simply wanted Congressional reaffirmation of it. The post-Kent history is also important because it shows express rejection of peacetime travel controls, as in 1918, 1919, and 1920. The Court has previously relied on the post-Kent failure to enact authority sought by President Eisenhower. United States v. Laub,
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of protecting the internal security of the United States....the Court says it is impermissible to deny a passport because its issuance would be contrary to the national interest." 104 Cong. Rec. 13335, 13337 (1958).

House sponsors of post-Kent legislation were equally quick to stress the Secretary's lack of authority to deny passports on national security grounds. In introducing H.R. 13760, which eventually passed the House, Rep. Selden stated that legislation was needed "to fill the gap that has resulted from the Supreme Court's decisions" in Kent and Dayton. Id. at 19654 (1958). According to Selden (id.), those

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385 U.S. at 486. In a comparable case where after extensive consideration Congress denied authority sought by the President, the Court relied heavily on that denial as evidence that the authority did not exist. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1953), id at 597-609 (Frankfurter, J. concurring), id. at 637-41 (Jackson, J., concurring). See also New York Telephone Co. v. New York Labor Dept., 440 U.S. 519, 530, 540-544 (1979); Teamsters v. Morton, 377 U.S. 252, 259-60 (1964).

decisions

> held in effect that there is no law in being at the present time which authorizes the Secretary of State to deny passports to persons wishing to go overseas to engage in activities harmful to the United States, such as espionage, subversion of foreign governments, and propaganda.

Rep. Collier similarly argued (id. at 15823) that

> [T]he Court's ruling simply states that the Congress has not given the Secretary of State authority not to issue passports except in cases of definite proof that the applicant is fleeing from justice.

Rep. Morano pointed out that if passport legislation "is not enacted, we are faced with a situation in which persons may go abroad to subvert and thwart the foreign policy of the United States and to stir up trouble....It is a necessity. The bill grants authority to the Secretary of State to plug this loophole." 104 Cong. Rec. 19654-55 (1958).

The Secretary's lack of authority became even clearer as hearings progressed on the various post-Kent proposals. Senator Javits explained in 1959 that

> there is no legislation in this area, and...the courts held that legislation was required, and we haven't as yet passed any. We could have passed a resolution in 24 hours...which would have stopped any passport being granted to anybody where we had the remotest question, until we could put in definitive legislation, but we didn't...[u]nder the law the Secretary of State had no discretion in the matter.
>
> Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 40-41 (1959).

A comparison of the various passport bills introduced in the Senate, prepared by the staff of the Committee on Foreign Relations and inserted into the hearings record, stated that the Secretary of State was authorized by existing statutes to deny passports only if the applicant "1) does not owe allegiance to the United States;

2) is trying to escape criminal prosecution or is engaging in criminal conduct; or 3) is a member of a Communist organization under a final order to register issued by the Subversive Activities Control Board." Id. at 29-31. Accord, 107 Cong. Rec. 10327 (1960) (remarks of Sen. Lausche).

Congress did not grant the President and Secretary of State the discretionary authority they admittedly lacked. Congressman Hays of Ohio called the State Department's own draft bill (H.R. 13318), which would have authorized the denial of passports to those whose travel would "seriously impair the conduct of the foreign relations of the United States" or be "inimical" to its security, a "monstrosity....Any critic of the foreign policy of Mr. Dulles could have been barred from travel if Mr. Dulles saw fit, and he has seen fit to bar critics in the past....It might be well to note in passing that the Senate Committee refused

even to consider the [administration's] bill." Hearings on Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further The International Communist Movement Before The House Committee on Foreign Affairs, 85th Cong., 2d Sess. 100-101 (1958).

Rep. Udall, in testimony before the same committee, noted that President Eisenhower had requested authority "to prevent Americans from using passports where their presence would conflict with our foreign policy objectives." That, Udall observed, "is a very broad request, and it seems to me that it runs counter to what the Supreme Court has said and to what our traditional position has been with regard to right to travel....To say that no one whose presence abroad is not in the national -- in the interests of the national security -- should be allowed a passport is the type of vague standard that I think the

committee should avoid." Id. at 72, 78.

Congress gave the proposed measures the serious attention that their importance and President Eisenhower's personal intercession warranted. Nevertheless, although two measures passed the House, none of the more than fifty passport bills introduced in Congress between 1958 and 1963 was enacted. T. Ehrlich, Passports, 19 Stan.L.Rev. 129, 141 n.59 (1966).

In 1966 the State Department again attempted to have enacted a comprehensive passport law, H.R. 14895, which would have authorized the Secretary to deny a passport upon determination "that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." Once again, the administration's proposals were not enacted.

6. The 1978 Amendments

The 1978 amendments are especially critical in deciding whether Congress has given the executive discretionary authority to impose travel controls on national security grounds, because, as past history shows, it is the requirement of a passport for travel which ensures that passport control produces effective travel control. However, in contrast to previous wartime impositions of the passport requirement, where Congressional debates demonstrated Congressional interest in travel control for national security reasons, a careful search of the 1978 legislative history fails to reveal any purpose other than the facilitation of travel. To the contrary, the 1978 history demonstrates Congressional intention to eliminate the principal remaining statutory bases for travel controls.

a. 8 U.S.C. §1185

The pre-1978 requirement that Americans carry passports upon entry and exit was linked via 8 U.S.C. §1185 to the existence of a national emergency, scheduled to lapse on September 14, 1978. See National Emergencies Act, Title I, §101, P.L. 94-412, 90 Stat. 1255 (1976), codified at 50 U.S.C. §1601. During a 1978 debate on the annual Foreign Relations Authorization Act, H.R. 12598, which contained no travel-related provisions, Rep. Eilberg offered an amendment to prevent

> the impediment [to travel] that will occur if the passport requirement is allowed to lapse.... Abandoning the passport requirement for United States citizens and nationals may result in many cases where travelers arrive at their destination only to discover that they are not allowed entry because they lack proper documentation. 34/

124 Cong. Rec. 4689 (daily ed. May 31, 1978).

34/In hearings on the National Emergencies Act the State Department's Deputy Legal Adviser had also stressed that dropping the passport requirement would hamper citizen travel. Hearings on H.R. 3884 Before the House Judiciary Committee, 94th Cong., 1st Sess. 82-83 (1976)(testimony of Mark Feldman). Mr. Feldman did not mention national security. Id.

Representative Eilberg emphasized the absence of any national security considerations behind this passport requirement by

> deleting the provisions in the administration's bill for an administrative penalty against persons who violate any provisions of section 215. The thrust of my amendment is to facilitate travel, not to obstruct it and cover it with penal overtones. Id.[35]

Congressman Fish expressly contrasted the administrative incursions on the right to travel in the early 1950s with the strong congressional protections of the right to travel represented by the 1978 amendments. Id. at 4690.

35/The Secretary's argument that the 1978 Congress ratified national security revocation authority is either careless or misleading. The passage he relies on (Pet. 16, Br. 47) was part of the Senate Foreign Relations Committee's attempt to explain the removal of area restrictions on travel in §211a, and has nothing whatosever to do with the §1185 amendment. In fact, the Senate Committee report from which the statement is drawn was printed and released two weeks before the §1185 amendment was even introduced in either house of Congress.
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Every Congressman -- Reps. Eilberg, Fish, Buchanan, Ashbrook, and Zablocki -- who commented on the §1185 amendment requiring passports agreed that its purpose was solely to facilitate travel. The amendment quickly passed without a roll-call vote. 36/

Even the Kent dissent, therefore, would be constrained to hold that the Secretary now lacks national security revocation authority. The dissent had found such authority in 1958 solely because it believed that the 1952 passport requirement was intended to author-

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The quotation does have bearing on the very different provision removing the executive's area control power, but even there it does not stand for the proposition the Secretary urges, as restoration of the missing portion demonstrates. See infra at 94.

36/The Eilberg Amendment was incorporated verbatim by the Conference Committee, and passed without comment in the Senate. The Conference Report (No.95-1535), like the amendment itself, makes no reference at all to the Secretary's power to deny or revoke passports. In light of Kent's rule that an intention to infringe liberty will not be inferred, but must be clearly stated by Congress, see supra at 59 n.19, the history
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ize the emergency travel control previously instituted in wartime in 1918 and 1941. But even if that argument were accepted for the 1952 enactment of a national security-tied passport requirement, however, and it was squarely rejected in Kent, it is hardly germane to the 1978 imposition of the requirement, which the legislative history shows was intended to "facilitate travel," and which was part of a series of actions Congress took to eliminate wartime or emergency measures and to reduce executive discretion.

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of the 1978 amendment forecloses any argument that Congress authorized travel controls in 1978. Had Congress intended to approve or strengthen executive authority in §1185, surely it would not have pulled the teeth from such authority by completely eliminating criminal penalties for its violation, penalties which had been partially upheld in United States v. Laub, supra.

b. 22 U.S.C. §211a

The 1978 State Department appropriations bill in the Senate included a travel-related provision largely withdrawing the area control restrictions Zemel had held authorized. The history of the enactment of that provision discloses clear Congressional opposition to travel controls and an intent to facilitate travel by removing travel restrictions.

Although the State Department itself had acknowledged a commitment to "the general principle of freedom of travel" following President Carter's abolition of area travel restrictions in 1977, the Senate committee believed that "the freedom-of-travel principle is sufficiently important that it should be a matter of law and not dependent upon a particular Administration's policy." S.Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978). In light of the Congressional deletion of area control authority in

§211a "[f]or the purpose of achieving greater United States compliance" with the Helsinki human rights accords, id. at 15, it is easy to understand the government's desire to brush over the 1978 amendments, and to focus instead on wartime measures. That the §211a amendment was passed as a piece of human rights legislation hardly helps the government in its attempts to restrict the international travel of a dissident.

The amendment was not debated on the Senate floor and was changed only slightly in conference committee to authorize area controls "where there is imminent danger to the public health or the physical safety of United States citizens", see S. Rep. 95-1535, at 45, reprinted at 1978 U.S. Code Cong. and Ad. News 2478. Except for countries "with which the United States is at war, [or] where armed hostilities are in progress," §211a authorizes no area control

restrictions for national security reasons; only threats to the individual safety of travelers themselves suffice. Id.

Although the Foreign Relations Committee report did acknowledge that "the passport authority should not be restricted in any way which would limit the President's ability to control the departure of United States citizens to foreign countries when such travel is inconsistent with a greater goverment interest," S.Rep. 95-842 at 14, see supra at 90 n.36, the report continues (where the government's brief stops quoting) to specify just which interests were at stake -- precisely the "greater interests" for which travel controls were held in Kent to have been authorized by Congress, namely "preventing a citizen who is seeking to avoid the judicial processes of the United States." S.Rep. 95-482 at 14. Nothing in the Senate Report or elsewhere in the 1978 legislative history indicates any congressional intention, much less a clear inten-

tion, to authorize individualized travel controls, a greater restriction on liberty, when it limited authority to impose the lesser restriction of area restrictions. 37/

In sum, the original grant of Congressional authority to "grant and issue" passports was not intended to confer on the Secretary discretionary power to control travel. At every juncture -- 1918, 1919, 1920, 1926, 1941, 1952, 1958, 1966, and 1978 -- Congress either plainly

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37/The Congressional intention can also be measured by §603 of the bill, "International Journalistic Freedom," 92 Stat. 985. In words directly applicable to journalists such as respondent, Congress found that "news dissemination and the free flow of information across national boundaries are vital to international understanding and to healthy relations among countries," id. §603(a)(1). See remarks by Sen. Percy, 124 Cong. Rec. S9973 (daily ed. June 28, 1978). The Congressional intent behind the 1978 amendments was generally to further the flow and exchange of ideas, persons, and communication across national borders.

expressed an intention not to provide such authority in peacetime, or was silent in a way that cannot possibly confer on the Secretary the authority he seeks.

E. The Decision Below, Based Solely on Statutory Grounds, Does Not Interfere With The Executive's Ability To Conduct Foreign Affairs And Protect The National Security.

Petitioner consistently throughout this case has disclaimed any reliance on inherent executive power. He nevertheless complains (Br. 47-54) that the decision below "strays far from" principles affording the President "very delicate, plenary, and exclusive power" over the country's foreign affairs, citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). Petitioner's argument would make sense if addressed to a holding that he lacked constitutional authority, as opposed to statutory authority, but it is irrelevant here. Petitioner does not dispute that the power to abridge freedom of travel is a Congressional power. Kent, supra, at 129. If the President does not believe law enacted by Congress provides sufficient power to undertake his responsibilities, his recourse is not with this Court, but with Congress, in which the

the Constitution has vested the entire law-making power. Thus, even if it were true that the decisions below impede the "conduct of foreign relations," the constitutionally sanctioned solution would be Congressional provision of the necessary authority to the Executive, subject of course to constitutional constraints.

That was the holding in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), where a comparable assertion regarding the President's foreign affairs and national security responsibilities was forcefully rejected by this Court. President Truman had seized the steel mills during the height of the Korean War to protect the national security, far more credibly than here. The Court nevertheless set aside the seizure as unauthorized by law, notwithstanding the President's express reliance on executive power, holding that even an emergency could not create powers that had not been duly conferred. Significantly, the Court relied

heavily on the fact that the powers used had been sought from, and refused by, Congress.[38/]

Nor did Judge Robb's opinion leave the President powerless in the absence of a formal indictment or Congressional action to supply the authority held lacking. See Pet. App. 16a n.10.[38a/]

38/ Justice Jackson, no opponent of strong executive powers, noted that the foreign affairs cases relied on by the Executive in Youngstown, including Curtiss-Wright and MacKenzie v. Hare, 239 U.S. 299, 311 (1915), support only executive actions in external affairs and not, as here and in Youngstown, abridgment of the rights of private citizens. 343 U.S. at 635 n.2. Summarizing the cases on executive powers, he observed: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb...Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." Id. at 637-38.

38a/ No action has been taken to indict respondent. Indeed, on March 18, 1977, Attorney General Civiletti provided Mr. Agee's attorneys with a letter stating that the government had no intention of indicting him for his leading book, Inside the Company: A CIA Diary.

The procedural protections of the criminal law embedded in the Constitution are designed to prevent unjustified deprivations of liberty. Relying on Snepp v. United States, 444 U.S. 507 (1980), the government argues that it may disregard those procedures and summarily and drastically curtail respondent's liberty on tenuous "national security" grounds simply because it sees an "unacceptable risk" in instituting the criminal proceedings which would concededly justify revocation of respondent's passport under Kent. Unlike Snepp, however, this is not a contracts case. There has been no contractual violation which would justify invocation of the Court's common law powers to create an effective contractual remedy. Instead, petitioner here simply argues that

on specified administrative findings he may summarily and drastically abridge the right to travel. In such circumstances, at least in the absence of express Congressional authorization, petitioner cannot avoid on grounds of inconvenience the procedural safeguards of the criminal law, which permit full testing of the government's "evidence" by a jury and an opportunity for public vindication.

II. THE SECRETARY'S REVOCATION OF RESPONDENT's PASSPORT IS CONSTITUTIONALLY INFIRM.

Respondent has pressed three substantial constitutional challenges to the Secretary's revocation of his passport at every stage of this litigation. Neither of the courts below considered those challenges; both courts found the regulation unauthorized. If this Court reaches those constitutional questions, it must find that the revocation violated respondent's rights under the First and Fifth Amendments to the Constitution.

A. The Secretary's Revocation of Respondent's Passport Impermissibly Burdens His Right To Travel.

The Secretary argued below and suggests here that restrictions on right to travel are to be judged on a "rational basis test", and upheld so long as the limitation "is not arbitrary, capricious, or unreasonable", relying on Califano v. Aznavorian, 439 U.S. 170 (1978). That reliance is misplaced. The right of international travel is a

fundamental part of our liberty, Kent, Aptheker, and Zemel, supra, and administrative actions directly abridging it, as here, must be strictly scrutinized, and upheld only if they are narrowly tailored to further compelling governmental purposes. Aptheker requires this Court to set aside the regulation on which the revocation here is based if it is overbroad, irrespective of whether respondent's activity falls within some "core" of conduct which could be prohibited. Under the controlling authority of Aptheker, §51.70(b)(4) is plainly invalid on its face and as applied, and must be set aside.

As the Court observed in Kent, the right of international travel is a fundamental part of the liberty protected by the Fifth Amendment, and had been expressly guaranteed by Anglo-Saxon law at least since the Magna Carta. 357 U.S. at 125-126 and n.12. Aptheker v. Secretary of State held that direct abridgments of the right of international travel would be judged by the strict test accorded direct abridgments of the rights of

free speech and association. 378 U.S. at 508. The Court expressly held that "restrictions on the right to travel abroad" were to be judged by the "principle" of NAACP v. Alabama and Shelton v. Tucker. Id. at 507-508. See also Lynd v. Rusk, 389 F.2d at 945.

Califano v. Aznavorian has not overruled these precedents or withdrawn the firm constitutional protection they afford the right of international travel. That case simply applied the rule that unintended, "incidental" burdens on protected rights arising as a consequence of otherwise valid welfare statutes not aimed at the exercise of those rights will be upheld where no greater than necessary to accomplish the governmental aim.[39/] The "inciden-

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39/ Thus, the Court in Aznavorian stressed that "the statutory provision in issue here does not have nearly so direct an impact on the freedom to travel internationally as occurred in the Kent, Aptheker, or Zemel cases. It does not limit the availability or validity of passports. It does not limit the right to travel on grounds that may be in tension with the First Amendment." 439 U.S. (footnote continued on next page)

tal" restriction in Aznavorian can hardly be compared with or judged by the same standard as the regulation here, which is not an unintended and unavoidable burden on the right to travel, but rather a direct, intentional curtailing of that right.

We turn, then, to judging §51.70 and the revocation by the standards required by Aptheker. Under that test, it is clear that §51.70 must be set aside because it is not narrowly tailored to further a compelling governmental interest without "unduly...infring[ing]" the right to travel. Aptheker, 378 U.S. at 509.[40/]

(footnote continued from previous page) at 177, 58 L.Ed.2d at 442. The Court contrasted legislation directly interfering with protected liberty, with that indirectly burdening it, by comparing Califano v. Jobst, 434 U.S. 47 (1977)(incidental restriction arising from welfare benefits restriction upheld) with Zablocki v. Redhail, 434 U.S. 374 (1978)(direct infringement struck down.) See 439 U.S. at 177 n.6.

40/ Aptheker makes clear that the Court treated the challenged statute as a restriction on travel, not on speech or association, and applied overbreadth analysis to direct infringements of the right to travel generally. See 378 U.S. at 507-508, 515-517.

First, §51.70 permits revocation on a substantially overinclusive standard. The overbreadth of the regulation is sufficiently made out by reference to the extraordinarily broad historical practices petitioner labels "national security" denials to support the denial here, including denials of passports to common parolees whose presence abroad would interfere with "international comity",[41] and to blackmailers whose presence abroad would "disturb relations of this country with the representatives of foreign countries."[42]

41/ See Govt. Br. 30, discussed supra at 44.

42/ See Govt. Br. 30, discussed supra at 41-42. Indeed, the Department of State compilations of passport revocations submitted to the courts below and relied on here reflects a single category of "Participants in political affairs abroad whose activities were deemed abroad has been such as to bring discredit on the United States and cause difficulty for other Americans (gave bad checks, left unpaid debts, had difficulty with police, etc.)." See supra at 38. All of the revocations in this category are deemed by the Secretary to support, as a matter of practice, the regulation challenged here.

Second, revocation is permitted on a determination that an individual is "likely to cause serious damage to the...foreign policy of the United States." 22 C.F.R. §51.70(b). The regulation is not limited to harm to national security. And the judgment that someone has "damaged" our foreign policy, rather than "aided" it (or is "likely" to do so) is frequently a matter of political opinion, of commitment to orthodox views, and is certainly susceptible to abuse. The Court has never sanctioned the abridgment of liberty on so flexible a standard. Compare New York Times v. United States, 403 U.S. 713 (1971).

The Secretary's standard would have justified revocation of passports of American journalists in Vietnam, or of those gathering information on the attempted Bay of Pigs invasion.[43/] The regulation could on its face

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43/ Significantly, President John F. Kennedy commented that he wished the New York Times had not heeded his warnings that reporting of the Bay of Pigs invasion would harm our foreign policy, and printed its story in dis-
(footnote continued on next page)

bar critics of American foreign policy from travelling abroad to influence international opinion against current administration policies on a range of issues - NATO policy, nuclear power policy, detente. Yet plainly such reporting is protected by the First Amendment. Far from being subject to administrative proscription (which is what the revocation of a journalist's passport amounts to), it is precisely part of the flow of information needed by citizens to undertake intelligently their responsibilities of citizenship. The very existence of this sweeping regulation impermissibly chills protected activity and requires invalidation by the Court.

Third, the regulation authorizes total revocation, even though an order barring use of the passport to a particular country or countries, or for a particular purpose, would

(footnote continued from previous page)
regard of that warning. What was thought certain to "damage" foreign policy, in hindsight, would have aided it.

serve the government's goal. Surely not everything that Mr. Agee does abroad, or everywhere he travels, causes "damage" which the Secretary may be empowered to reach. Under Lynd v. Rusk, 389 F.2d at 943, §51.70(b)(4) as applied is unconstitutionally over-restrictive of respondent's Fifth Amendment rights. See also Aptheker v. Secretary of State, 378 U.S. at 511-512 ("under the statute, it is a crime ...to apply for a passport to travel abroad to visit a sick relative, to receive medical treatment, or for any other wholly innocent purpose.") In short, even if the Court were to find the regulation authorized, the interest asserted by the government would only justify the partial invalidation of his passport for travel, for example, to the Islamic countries where the government has claimed special risks of Mr. Agee's travel exist. To the extent that he uses his passport for travel to other countries, or for other purposes, the government has not even suggested

any interest that restricting such travel would serve.

Aptheker establishes respondent's standing to urge overbreadth. The dissent there strenuously argued that even if the challenged statute were overbroad, appellant's travel could be curtailed because it was at the core of proscribable conduct under express Congressional findings, see 378 U.S. at 521-525, and the Court squarely rejected that argument, 378 U.S. at 517, striking down the regulation for cutting too deeply into protected liberty without even inquiring whether the well-known Communist Party leaders before it posed actual danger to the national security. The holding of Aptheker is squarely controlling here. An overbroad restriction on freedom of travel is invalid, regardless of whether the travel of persons to whom it is applied could be constitutionally proscribed. Respondent agreed not to contest the Secretary's "determination" for purposes of the motion for

summary judgment on the constitutional questions (JA 23-24) precisely because Aptheker rendered even a true factual concession irrelevant (as were the congressional findings regarding the danger to national security posed by travel of Communist Party leaders.[44/] As the dissent in Aptheker noted, the leaders of the Communist Party seeking passports in that case had not contested the Congressional findings terming their travel, in substance, an extremely serious danger to the national security. 378 U.S. at 521-525. Therefore, even if Mr. Agee could be thought bound by the Secretary's charges here, he is in precisely the position of the appellants in Aptheker and similarly entitled to challenge the regulation on its face for overbreadth. If the regulation is invalid, its defects are not affected by the respondent's decision not to challenge the Secretary's determination that he falls within its scope.

44/ Congress has expressly found that the "travel of Communist members, representatives
(footnote continued on next page)

Aptheker, 378 U.S. at 516-517.

B. Revocation of Respondent's Passport Was Intended to Harass, Penalize, and Deter His Criticism of United States Policies and Practices, in Violation of the First Amendment.

The denial or revocation of passports based on the exercise of activity protected by the First Amendment is constitutionally forbidden. The revocation of respondent's passport was intended to deter him from criticizing American foreign policy and intelligence activities, and violates the First Amendment proscription of governmental actions designed to prevent individuals from exercising their right to engage in political speech.[45/]

(continued from previous page)
and agents" furthered the purposes of the Communist movement which was "a clear and present danger to the security of the United States and to the existence of free American institutions." Internal Security Act of 1950, 64 Stat. 993, 50 U.S.C. §781(8) and (15).

45/ Governmental actions such as this, aimed at the communicative impact of speech and motivated by an intent to control or penalize it, are judged by the most exacting First Amendment standards. See generally Tribe, American Constitutional Law,
(footnote continued on next page)

A First Amendment challenge to area restructions in Zemel was rejected largely because "the refusal to validate appellant's passport does not result from any expression or association on his part...." 381 U.S. at 16. The Court emphasized the special First Amendment dangers of refusals "based on the character of the particular applicant." 381 U.S. at 13. Here, however, petitioner seeks to justify revocation precisely because of respondent's "expression" and "association." Indeed, petitioner relied upon respondent's "public allegations"--whose truth is not even denied--as the sole basis for revocation. See Newsom affidavit, ¶¶3-5, CA App. 36-37. The First Amendment denies the government power to deter the lawful collection,

(footnote continued from previous page)

at 584-588, 591-94 (1978). Judge Gesell has denied the government's motion to impose a constructive trust over the proceeds of Mr. Agee's books in a related lawsuit because he found a serious "factual issue as to whether the Government's past enforcement has been clouded by content considerations rather than wholly legitimate concerns for security." J.A. 39-45.

publication, or dissemination of information, even if the government believes foreign policy or national security will be damaged, and this is particularly so in the absence of explicit Congressional authority.[46/] See New York Times v. United States, supra.

Petitioner's attack on the First Amendment by the revocation is a far more direct subversion of the right of free speech than was the statute condemned in Aptheker v. Secretary of State, supra. It has never been suggested, to our knowledge, that public statements of fact criticizing foreign

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46/ Petitioner has properly not relied on Snepp v. United States, 444 U.S. 507 (1980), as a basis for the revocation, and could not now do so. SEC v. Chenery, 332 U.S. 194, 197 (1947). Moreover, the relief sought by petitioner--the total revocation of respondent's passport for all purposes whatsoever--is far greater than Snepp or general equitable principles would permit. See Dayton v. Brinkman, 433 U.S. 406-420 (1977). Nor has petitioner relied on the unlawfulness of respondent's speech. See supra, at 99n.38a.

policy and its execution can be the basis for deprivation of fundamental liberty. Petitioner is trying to force respondent into precisely the choice repeatedly condemned by this Court in Kent, Aptheker, and again in Zemel: a choice between his First Amendment activity and freedom to travel. See generally Zemel, 381 U.S. at 16. The Constitution denies government the power to put Americans to that choice, securing both liberty of travel and freedom of speech.

Petitioner's reliance on Zemel is unpersuasive. The restricted flow of information in Zemel arose as an incidental and unintended consequence of a regulation applied to all citizens, regardless of their views. Here, petitioner's revocation of respondent's passport was intended as a direct abridgment of his speaking and journalistic activities abroad. Zemel expressly distinguished cases such as respondent's

from the uniformly applied area travel restrictions at issue there. See 381 U.S. at 13, 16.[47/]

C. Summary Revocation of Respondent's Passport Prior to Any Notice or Opportunity to be Heard Violates The Due Process Clause of the Fifth Amdendment.

Even if the full hearing provided for by the regulations could in the circumstances of this case have followed summary revocation, the failure to afford respondent any of the basic rudiments of due process, notice, and an informal opportunity to be

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47/ Petitioner's argument that it seeks only to restrict respondent from traveling, not from the exercise of First Amendment activity, is disingenuous. Respondent's travel is viewed as dangerous only because of the "public allegations" he is expected to make. Surely petitioner does not believe, nor has it argued, that travel by respondent with his family for leisure or non-business purposes would be a danger to American foreign policy or national security. Petitioner's goal is precisely and solely to prevent respondent from publicly speaking abroad. The proceedings in respondent's FOIA case also evidence the government's intent to enjoin respondent's speech. See supra, n.45.

heard prior to summary revocation, violated his right to procedural due process.

The first that respondent heard of any governmental plans summarily to revoke his passport was the delivery to him on Sunday morning, December 23, 1979, of a letter from the American Consul in Hamburg advising that his passport was "revoked." The effect of that revocation was immediate and severe, an irremediable "grievous loss" of the fundamental constitutional right to travel secured and protected by the Fifth Amendment, for at least as long as the "revocation" was not overturned. He was immediately prevented from traveling outside West Germany. Moreover, as the government knew, revocation also altered his status as a resident of West Germany under German law, subjecting him to the risk of deportation. Yet respondent was not given any advance warning or notice, informal or formal, or opportunity to be heard. He was not advised, before effective summary revocation, of the

grounds on which the Secretary proposed to take such action. Nor was he offered an opportunity to respond to such grounds, to allay the Secretary's doubts or fears as to the safety of our national security or foreign policy, by stating his side of the "facts" relied on by the Secretary. Under the circumstances of this case, effective revocation prior to such usual safeguards as notice and an opportunity to be heard violates the right to procedural due process guaranteed by the Fifth Amendment.[48/]

The keystone of due process is:

> The fundamental requirement...[of an] opportunity to be heard at a meaningful time and in a meaningful manner.

Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citations omitted). "What process is due" depends on a number of factors, and in some circumstances a full hearing may follow temporary action, so long as the individual

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48/ This was the holding nearly twenty-five years ago in Bauer v. Acheson, 106 F.Supp 445 (D.D.C. 1952)(three-judge court).

affected can be later made whole should the initial decision prove unjustified. But even where it has rejected the necessity of a full evidentiary hearing prior to initial termination, postponing such hearings until after summary action, the Court has insisted on the fundamentals of prior notice and opportunity to know and respond to the evidence on which charges are based. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 338 (1976) (due process prior to disability benefit termination satisfied by notice of proposed termination, summary of evidence on which action will be based, opportunity to respond in writing and to present additional evidence); Goss v. Lopez, 419 U.S. 565 (1975) (due process prior to school suspendion requires oral or written notice, and explanation of decision-maker's evidence, and opportunity to present own story); Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535, 540 (1971); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S.

601, 607 (1975); Arnett v. Kennedy, 416 U.S. 134, 142-46 (1974); University of Missouri v. Horowitz, 435 U.S. 78, 85-86 (1978); Id. at 97 (White, J. concurring); Mackey v. Montrym, 443 U.S. 1, 13-15(1979) (due process requires "[A]t the very least ...informal opportunity to tell her side of story" and notice); see generally 2 Davis, Administrative Law Treatise §11:12 (2d Ed. 1979). Respondent too is entitled to the relatively informal, but vital process that was afforded in each of those cases prior to effective deprivation of "life, liberty, or property" to ensure a reliable decision, even if he was offered a later full dress hearing.

Analysis of the factors relevant to determining what process is due shows plainly that his right to due process was violated. See generally Mathews v. Eldridge, 424 U.S. at 341-348.

The first factor is the nature and

weight of the private interest affected. The summary revocation immediately and severely abridged respondent's liberty, altered his legal status as a resident of West Germany, subjected him to risk of deportation, and prevented his free movement.

The second part of the Eldridge inquiry involves consideration of the likelihood of erroneous deprivation. As opposed to those cases involving relatively objective facts,[49/] respondent's passport was revoked on the basis of an amorphous judgment concerning the "danger" he presented to the "national security" or to our "foreign policy", and speculation as to his future activities - specifically, whether he would continue the journalistic activities complained of, and whether depriving him of a passport would likely be effective in cen-

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49/ See, e.g., Dixon v. Love, 431 U.S. 105 (1977)(fact of previous conviction); Mathews v. Eldridge, supra (medical facts).

soring his public speaking and writing. In this regard, Agee could well have provided information that would have radically changed the Secretary's decision - for instance, that whatever information he seeks to impart could be communicated from the United States, or from other countries not requiring a valid passport for entry. Moreover, summary revocation in fact was erroneously predicated on a report that "Mr. Agee had been invited to travel to Iran in order to participate in a tribunal involving the hostages in Iran." See Newsom Aff., CA App. 37, ¶4. That report was a total fabrication. See Agee Aff., JA 29 ¶¶5-7.

Finally, the third Eldridge factor to be considered is the governmental interest in summary procedure, as well as the administrative or fiscal burden from the substitute procedure sought.

The government argued below that its interest in "the preservation of the national security" justified its decision to offer a

post-revocation hearing. But the question is whether that interest, even if it could justify postponement of the full-dress hearing, also justified dispensing with even the bare rudiments of due process prior to summary action: notice, and an opportunity to be heard, the informal procedures afforded prior to summary action in Goss v. Lopez, Mathews v. Eldridge, and the other cases cited supra.

The record discloses no national security need for action more summary than would have occurred had an opportunity to be informally heard (but not a full trial-type hearing) been provided. The informal procedures whose deprivation is complained of could have been provided during the course of a day, at most, without possibility of harm to the "national security". As Judge Parker, sitting as motions judge, pointedly observed, the reasons relied on by the Secretary in the letter served on Mr. Agee are

not reasons justifying emergency action at all. To the contrary, when his passport was renewed in 1978, the Secretary was fully aware of his activities and the "damage" which in the government's view they had caused. Since respondent's activities have not changed, and in the government's view disclosure of the identities of CIA agents has always been dangerous, it is hard to justify the need for summary action on the Sunday prior to Christmas. The situation here is simply not the kind of "emergency" which has been held to justify summary deprivation of fundamental rights. See generally, Mackey v. Montrym, 443 U.S. at 21 n.1 (Stewart, J., dissenting). Nor would procedures whose denial plaintiff complains of cause fiscal or administrative burden as in Mathews v. Eldridge, and the Secretary does not contend otherwise.

In short, under the circumstances of this case, respondent was entitled to pro-

cedural protections prior to the effective summary revocation of his passport. Having been denied due process, the revocation was contrary to law and must be reinstated pending provision of due process.

CONCLUSION

For all the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 22, 1980

*Counsel wish to acknowledge the substantial assistance of Steven Perry, a third year law student at Yale Law School, in the research and preparation of this brief.

No. 80-83

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In the Supreme Court of the United States

OCTOBER TERM, 1980

EDMUND S. MUSKIE, SECRETARY OF STATE,
PETITIONER

v.

PHILIP AGEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

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1. Respondent primarily contends (Resp. Br. 7, 15-18, 27-34, 62, 78-79, 91) that the decisions in *Kent* v. *Dulles*, 357 U.S. 116 (1958), and *Dayton* v. *Dulles*, 357 U.S. 144 (1958), are controlling here. Those cases are readily distinguishable, however. In both *Kent* and *Dayton*, the Secretary of State refused to issue passports to several citizens because they were communists. In denying the applicants' request, the Secretary relied solely on 22 C.F.R. 51.135 (1957), which provided that "no passport * * * shall

be issued to * * * [p]ersons who are members of the Communist Party or * * * who engage in activities which support the Communist movement[, or who] are going abroad to engage in activities which will advance the Communist movement * * *." See *Kent* v. *Dulles*, *supra*, 357 U.S. at 117-118 n.1. The Secretary did not cite or rely on 22 C.F.R. 51.136 (1957), a predecessor version of the regulation at issue in this case, which stated that a "passport * * * will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) Violate the laws of the United States; (b) *be prejudicial to the orderly conduct of foreign relations*; or (c) *otherwise be prejudicial to the interests of the United States*." 21 Fed. Reg. 336 (1956) (emphasis supplied).

Thus, "the issue involved in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations" (*Zemel* v. *Rusk*, 381 U.S. 1, 13 (1965)), and not whether the Secretary has authority to revoke a passport on foreign policy or national security grounds. As the Court explained in *Kent* (357 U.S. at 130; emphasis supplied):

> We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement *solely* because of their refusal to be subjected to inquiry into their beliefs and associations.[1]

Likewise, the Court has subsequently emphasized that the *Kent* decision held only "that Congress had not

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[1] *Dayton* simply concluded that the passport in that case had been denied "for reasons which we have today held [in *Kent*] to be impermissible." 357 U.S. at 150.

conferred authority upon the Secretary of State to deny passports because of alleged Communist beliefs and associations." *Aptheker* v. *Secretary of State*, 378 U.S. 500, 506 (1964). See *Zemel* v. *Rusk*, *supra*, 381 U.S. at 13. Here, of course, the Secretary revoked respondent's passport not because of his beliefs or associations, but because, as he concedes, his travels are substantially harming the national security and foreign policy of the United States.

To be sure, the dissenting Justices in *Kent* suggested that the Secretary had acted in that case "to deny a passport to a Communist whose travel abroad would be inimical to our national security." 357 U.S. at 131 (Clark, J., dissenting). But that observation, as the decisions in both *Kent* and *Aptheker* make clear, was premised on the erroneous assumption that mere membership or association with the Communist Party, or belief in communist principles, is harmful to the nation's security and foreign policy. See 357 U.S. at 128. Indeed, in *Aptheker*, the Court considered the validity of a statute enacted "to protect our national security" by prohibiting the issuance of a passport to any member of a communist organization. See 378 U.S. at 509. Notwithstanding Congress' specific findings regarding the danger posed by the foreign travel of all communists, the Court held the statute unconstitutional on its face because "[t]he prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe." *Id.* at 514.

2. In our opening brief (Br. 20-47), we demonstrated at length that the Secretary's revocation of respondent's passport on national security and foreign policy grounds is consistent with 200 years of

administrative practice and Congress' evident intent. In an effort to discredit this unbroken and compelling historical record, respondent raises three erroneous contentions. First, respondent suggests (Resp. Br. 35-47) that the Secretary is required to establish a consistent administrative practice solely on the basis of actual passport revocations and denials and that he has failed to do so here. Second, respondent argues (Resp. Br. 47-58) that in any event the Executive has been inconsistent in its view of the Secretary's authority over the denial and revocation of passports. Finally, respondent contends (Resp. Br. 59-96) that the legislative history shows that Congress has sought to deny the Executive the precise power that it exercised in this case. We address these claims in turn.

a. Respondent erroneously states (Resp. Br. 46) that "*Kent* and *Zemel* are explicit that it is the actual exercise of power over passports by the Secretary, rather than the mere expression of the power, which determines useable administrative practices." At the outset, we note that our opening brief identifies more than 100 actual cases in which the Secretary has apparently revoked or denied a passport on national security or foreign policy grounds. See Pet. Br. 28-30, 39-40 and n.30. More examples undoubtedly exist among the passport records of the Department of State. In large part, however, the relatively discrete number of cases in which the Secretary has revoked or denied a passport on national security or foreign policy grounds is attributable to the Secretary's judicious exercise of his authority and the fact that few citizens have either the inclination or the ability to harm this country that respondent concededly has.[2]

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[2] Respondent's discussion of the individual cases is inaccurate. For example, respondent characterizes (Resp.

More important, respondent's major premise is patently flawed. In both *Kent* and *Zemel*, the Court considered State Department regulations and circulars, and other Executive pronouncements on passport policy, as well as actual passport denials, in determining whether the challenged passport control was consistent with prior practice. Thus, the authorities cited in *Kent* (357 U.S. at 127) quote several of the regulations, opinions, and general policy statements relied on by the Secretary in this case. See 3 J. Moore, *International Law Digest* § 512 (1906); 3 G. Hackworth, *Digest of International Law* § 268 (1942); C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* § 401 (2d rev. ed. 1945). Similarly, the administrative practice canvassed in *Zemel* consists primarily of general regulations, executive orders and the like, and not individual cases. See 381 U.S. at 8-12, 18. Indeed, because Congress is more likely to be aware of State Department policies and regulations rather than the denial or revocation of an individual passport, consideration of those policies and regulations is essential to a proper understanding of prior administrative practice.

Br. 41) the 1906 and 1907 passport denials discussed in our opening brief (Pet. Br. 29-30) as "both involv[ing] run-of-the-mill illegal conduct." The Secretary did not rely on the unlawful nature of the applicant's conduct, however, but on the effect of that conduct on our foreign relations. See Pet. Br. at 29-30. Furthermore, any illegal conduct that may have been involved in those cases concerned violation of foreign and not domestic law. Because the Secretary has authority to revoke or deny a passport on the ground of unlawful conduct only in cases involving the enforcement of the criminal laws of this country (see 22 C.F.R. 51.70(a)(1), (2), (4), and (5)), the revocations could not have been based on the allegedly illegal nature of the citizens' activities.

b. Respondent further claims (Br. 47-57) that the Executive has not consistently concluded that it may deny or revoke passports in order to protect the national security and foreign policy of this country. But respondent is unable to explain the unbroken line of executive orders, regulations, and passport office circulars discussed in our opening brief (Pet. Br. 26-28, 33-34, 36-38). Moreover, as we now demonstrate, respondent essentially relies on statements taken out of context or incompletely quoted.

Citing 13 Op. Att'y Gen. 397, 398 (1871), 15 Op. Att'y Gen. 114, 117 (1876), and 17 Op. Att'y Gen. 674 (1884), respondent claims (Resp. Br. 47, 61) that the Attorney General has repeatedly concluded that any citizen is entitled to a passport as a matter of right in peacetime. But none of these opinions focuses on the discretionary power of the Secretary to deny or revoke a passport, much less suggests that the Secretary is powerless to protect this country's foreign policy or national security in appropriate circumstances. Thus, the opinions of Attorneys General Akerman (13 Op. Att'y Gen. 397 (1871)) and Taft (15 Op. Att'y Gen. 114 (1876)) respectively explain that citizens of Texas at the time of annexation and naturalized citizens are to be treated like other "citizens of the United States, and are entitled to passports as such." 13 Op. Att'y Gen., *supra*, at 398.[3] Similarly, the opinion of Attorney General Brewster concerning the illegality of the issuance of certain

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[3] If the opinions relied on by respondent were intended to limit the Secretary's authority, it is inconceivable that they did not explain or repudiate the unequivocal and essentially contemporaneous opinion by Attorney General Hoar on the Secretary's broad discretionary power. See 13 Op. Att'y Gen. 89, 92 (1869).

identification documents by persons other than the Secretary of State is also clearly inapposite. See 17 Op. Att'y Gen. 674 (1884). In contrast, on the two occasions that the Attorney General has addressed the Secretary's authority regarding passports, he has unequivocally stated that "a passport * * * may, in [the Secretary's] discretion, be granted or withheld" in order to protect the public interest. See 23 Op. Att'y Gen. 509, 511 (1901); 13 Op. Att'y Gen. 89, 92 (1869).

Respondent also incorrectly suggests (Resp. Br. 47-50) that Secretaries of State have themselves on occasion stated that they must issue a passport to all citizens regardless of the danger to the nation's security and foreign policy. The two quotations cited by respondent are taken out of context. Thus, Secretary of State Fish's commentary that "any citizen of the United States has a right to be furnished with such evidence of citizenship" was made in the course of determining that a naturalized citizen is as entitled to a passport as any other citizen provided he "compl[ies] with the usual regulations." 2 Wharton, *International Law Digest* 465 (2d ed. 1887). Likewise, as the sentence following the material quoted by respondent (Resp. Br. 49-50) makes clear, Secretary of State Adee's letter of 1899 was intended only to reiterate that "[a]s a general rule it would hardly do to make moral character a basis for the issuance of passports." See 1899 *Foreign Relations of the United States* 187; 3 J. Moore, *International Law Digest* § 512, at 922-923 (1906). Secretary Adee did not purport to delineate the bases on which a passport could be denied, except to note that "refusal of a passport can be predicated on authority of law or on diplomatic instructions and regulations

made pursuant to law." 1899 *Foreign Relations of the United States* 187.[4]

c. Respondent's assertion (Resp. Br. 60) that the history of passport legislation shows "that Congress has steadily refused to provide or approve the authority here invoked" is remarkable. The discussion in our opening brief demonstrates beyond question (Pet. Br. 22-47) that the Passport Act of 1926 codified the Executive's broad discretionary powers over the issuance of passports, and that Congress, in considering and enacting various travel control legislation, has repeatedly and unequivocally evidenced its view that the Secretary may deny or revoke a passport in order to protect the national interest. Below, we respond briefly to the major errors and omissions in respondent's discussion of this history.

First, respondent erroneously suggests (Resp. Br. 65-66, 73) that the legislative history accompanying the Passport Acts of 1856 and 1926 shows that Congress viewed those provisions *solely* as a convenience for American travelers. None of the three isolated statements cited by respondent supports this sweeping contention, however.[5] Moreover, respondent's

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[4] Respondent's reliance (Resp. Br. 51) on a 1932 State Department letter is also misplaced. That letter was sent in response to a suggestion by a district attorney that passports be denied to persons who were leaving this country in order to abandon their families. The Department official was not addressing the foreign policy and national security considerations presented in this case. See 3 G. Hackworth, *supra*, at 500.

[5] For example, respondent misleadingly states (Resp. Br. 65) that "Senator Seward described the *bill* as a 'convenience to Americans abroad.'" Cong. Globe, 34th Cong., 1st Sess. 1797 (1856) (emphasis supplied). In fact, Senator Seward stated only that the provision of the Act authorizing American consuls abroad to issue passports was a convenience. See *ibid.*

characterization of the congressional purpose informing the Passport Act simply ignores the legislative reports, debates, and hearings that reflect Congress' understanding that the Secretary had previously exercised broad discretionary power over the issuance and denial of passports and that Congress had intended to codify that power. See Pet. Br. 25-26, 34-35.

Furthermore, respondent's discussion of the travel control statutes of 1918 and 1941 confuses the concepts of passport control, which involves the Secretary's authority to issue or deny passports, and travel control, which concerns Congress' decision to prohibit ingress and egress by citizens without a passport. As we explained in our opening brief (Pet. Br. 30-34, 40-42, 46-47), in 1918, 1941, 1952, and 1978, Congress enacted travel control legislation the effectiveness of which was wholly dependent on the Secretary's existing authority to revoke and deny passports to protect the national interest. In addition, the legislative history of each of those statutes evinces Congress' intent that the Secretary could and should refuse a passport to a citizen whose travels abroad are likely to harm the foreign policy and national security of the United States. It is irrelevant that, as respondent points out (Resp. Br. 67-72, 75-76), Congress also recognized that the Secretary perhaps lacked authority to impose *travel* control restrictions on the nation and that it declined (until 1978) to require such restrictions in non-emergency peacetime.[6] The issue in this case is whether the

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[6] In 1978, Congress established that unless otherwise provided by the Executive, a citizen must have a passport while entering or leaving the country. See Pub. L. No. 95-426,

Passport Act authorizes the Secretary to revoke respondent's passport because his foreign travels are concededly harming the national security and foreign policy of the United States, and not whether the Act authorizes the Secretary to compel respondent to have a passport as a condition for entering or leaving the country.[7]

Respondent's discussion of the post-*Kent* legislalative history is equally wide of the mark. He contends (Resp. Br. 52-57, 80-86) that following the decision in *Kent*, the Executive acknowledged that it lacked authority to deny a passport on national security grounds, and that it unsuccessfully sought congressional authorization on this point. In fact, however, the history shows that both the Executive and Congress were then focusing almost exclusively on the Executive's authority to limit the international travels of communists and not the separate issue presented by this case. See Pet. Br. 44-45. Furthermore, we again note that respondent's authorities do not support his claims.

Notwithstanding respondent's contrary assertions (Resp. Br. 52-57, 80), neither President Eisenhower

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Section 707(b), 92 Stat. 993, codified at 8 U.S.C. (Supp. II) 1185(b). The Senate Report issued with the 1978 Act states unequivocally that "the passport authority should not be restricted in any way which would limit the President's ability to control the departure of U.S. citizens to foreign countries when such travel is inconsistent with a greater government interest * * *." S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978).

[7] We further note that respondent mischaracterizes the 1920 debates as focusing on "[n]ational security considerations" (Resp. Br. 72 n.29). Again, respondent's citations fail to support his extravagant claims. See 59 Cong. Rec. 7173, 9407 (1920).

nor any other Executive official told Congress that the Secretary was without power to revoke a passport to protect the nation's security. In reality, administration spokesmen repeatedly informed Congress that the Department was "working under a regulation which says that whenever we believe it is in the national interest to deny or revoke a passport we have the authority to deny or revoke it." (*Proposed Travel Controls: Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 72 (1966)) and that this authority was "not in any way affected by the Supreme Court decision" in *Kent* (*Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs*, 85th Cong., 2d Sess. 7 (1958)). See also Pet. Br. 42-46; Pet. Reply Br. in response to the Br. in Opp. 5-6 & n.5. Similarly, respondent's description of the congressional debates following *Kent* is also incomplete and misleading.[8]

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[8] For example, in quoting Senator Eastland (Resp. Br. 80-81), respondent neglects to note that the then Chairman of the Senate Judiciary Committee not only criticized the decision in *Kent*, but also explicitly stated that "[t]he legislative history of the Passport Act * * * shows beyond question that it was the intention of the Congress at that time to give the Secretary of State authority to deny passports to those whose travel abroad would be contrary to the national security of this country." 104 Cong. Rec. 13336 (1958). Likewise, Senator Lausche, whose remarks are also cited by respondent (Resp. Br. 84), observed that even after *Kent* "[t]here would seem to be quite a broad area for the denial of passports which has not been tested in the courts." 107 Cong. Rec. 10327

3. Finally, respondent's procedural due process claim (Resp. Br. 116-125) is without merit.[9] At the outset, we submit that this issue, which was not addressed by the courts below, is not properly before the Court. The district court and court of appeals concluded that respondent is entitled to his passport and ordered the Secretary to restore that document. Upholding respondent's procedural contention would only provide respondent with a pre-revocation hearing and not his passport.[10] Hence, this claim is not an alternative ground supporting the judgment. In the absence of a cross-petition for a writ of certiorari on that issue, this Court would ordinarily not consider respondent's claim. See, *e.g.*, *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976).

In any event, the Department's regulations and the procedures used in this case fully satisfy respondent's right to procedural fairness. The Secretary personally made the determination to revoke respondent's passport and respondent was immediately informed of that decision (Pet. App. 120a-121a). This notice

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(1961). The other statements collected by respondent (Resp. Br. 81-83) are simply overly broad descriptions of the holding in *Kent* made by supporters of legislation designed to overrule *Kent*.

[9] We have previously addressed respondent's other insubstantial constitutional claims (Resp. Br. 102-116). See Pet. Br. 52-56.

[10] Respondent waived his right to an expedited post-revocation administrative hearing in Hamburg, West Germany. See Pet. App. 4a, 93a; 22 C.F.R. 51.80 *et seq.* Indeed, because respondent has conceded that his conduct falls within the terms of the regulation, even the denial of a post-revocation hearing would not have violated the Due Process Clause. See *Codd* v. *Velger*, 429 U.S. 624, 627 (1977).

further stated that respondent was entitled to a full administrative hearing and that the United States Consul in Hamburg was prepared to receive "on an expedited basis, any evidence you may wish to present on your behalf as to why your passport should be reinstated" (*id.* at 121a; see *id.* at 123a-124a; 22 C.F.R. 51.80 *et seq.*). In short, respondent had fair notice and an opportunity to be heard.

Respondent nonetheless argues that he was entitled to a pre-revocation hearing. This Court has repeatedly concluded, however, that ordinarily the summary deprivation of an interest protected by the Fifth Amendment does not violate the Due Process Clause, where, as here, an immediate post-deprivation procedure is available. See, *e.g.*, *Barry* v. *Barchi*, 443 U.S. 55, 63-65 (1979) (horse trainer's license); *Mackey* v. *Montrym*, 443 U.S. 1, 10-19 (1979) (driver's license); *Dixon* v. *Love*, 431 U.S. 105, 114 (1977) (driver's license); *Goss* v. *Lopez*, 419 U.S. 565, 582 (1975) (school suspension). To be sure, respondent has a substantial, although not fundamental, interest in his continued possession of a passport. See *Califano* v. *Aznavorian*, 439 U.S. 170, 176-177 (1978). But the government has a compelling interest in the protection of national security and our foreign relations, which unquestionably outweighs respondent's individual interests. See, *e.g.*, *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980). Indeed, requiring the Secretary to conduct a pre-revocation hearing would in many instances deprive the government of an opportunity to avoid serious damage to these interests before it occurs. Furthermore, the Secretary's personal determination of a revocation decision minimizes the chance of an erroneous deprivation, and the availability of an immediate post-revocation hear-

ing ensures that any unwarranted revocation of a passport will be short in duration. Accordingly, respondent was not deprived of procedural due process.

CONCLUSION

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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